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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~754~~ 25

HOWARD JOSEPH WHITEHILL, APPELLANT,

vs.

WILSON ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

FILED NOVEMBER 5, 1966
PROBABLE JURISDICTION NOTED FEBRUARY 13, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 754

HOWARD JOSEPH WHITEHILL, APPELLANT,

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WILSON ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

INDEX

	Original	Print
Record from the United States District Court for the District of Maryland		
Docket entries	1	1
Complaint for preliminary and permanent injunction and declaratory judgment	3	4
Exhibits A and A-1—Letter from University of Maryland, signed by Charles D. Murphy, Head of the English Department to Mr. Howard J. Whitehill, Jr., dated July 6, 1966 and form, "Certification of Applicant for Public Employment"	10	10
Exhibit B—Reply letter from Joseph Whitehill to Charles D. Murphy, dated July 11, 1966	12	12
Exhibit B-1—Letter from University of Maryland, signed by Charles D. Murphy, Head of the English Department to Mr. Howard Whitehill, Jr., dated July 18, 1966	13	13

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 30, 1967

	Original	Print
Record from the United States District Court for the District of Maryland—Continued		
Complaint for preliminary and permanent injunction and declaratory judgment—Continued		
Exhibit C—Opinion of Attorney General, C. Ferdinand Sybert, dated April 8, 1960, "Subversive Activities Act, Loyalty Pledge Requirement of Act Is Applicable to Persons Rendering Occasional Instructional Services for Compensation In University's Formal Instructional Program—'Employee' Defined"	14	14
Exhibit D—Sedition and Subversive Activities—Article 85A, Sections 1, 10, 11, 13 and 17	17	17
Application of plaintiff for convening of three judge court	20	21
Motion of plaintiff for preliminary injunction	22	22
Memorandum of points and authorities	23	23
Amendment to complaint for preliminary and permanent injunction and declaratory judgment	26	25
Defendants motion to dismiss	29	26
Memorandum in support (excerpts)	31	27
Transcript of hearing, September 1, 1966	53	29
Appearances	53	29
Letter of Joseph Whitehill to Charles D. Murphy, dated July 11, 1966 introduced at hearing	100	60
Opinion, Winter, J.	103	63
Concurring opinion, Sobeloff, J.	118	75
Order granting defendant's motion to dismiss	121	77
Notice of appeal to the Supreme Court of the United States	122	78
Clerk's certificate (omitted in printing)	126	81
Order noting probable jurisdiction	127	81

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

THREE-JUDGE COURT

Civil Docket 17564

Instituted 19 August, 1966

HOWARD JOSEPH WHITEHILL, JR.,

vs.

WILSON ELKINS, President, University of Maryland, Administration Office; Board of Regents, University of Maryland, Administration Office; J. JEROME FRAMPTON, JR., President, State Board of Education.

For Plaintiff: Sanford Jay Rosen, Arnold M. Weiner, Elsbeth Levy Bothe, Jos. S. Kaufman, Lee M. Miller.

For Defendant: Thomas B. Finan, Robert C. Murphy, Loring E. Hawes, Julius A. Romano.

Basis of action: Constitutionality of 1st and 14th Amendments; (Md. Subversive Activities Act of 1949).

Date	*Plaintiff's Account*	*Received*	*Disbursed*
1966			
/19	Jos. S. Kaufman filing fee	15.00	
/22/66	Tr. U.S. Clerk's fee		15.00
13-66	Sanford J. Rosen, filing fee, Notice of Appeal	5.00	

14-66 Tr. U.S.-Clerk's fee 5.00

Abstract of Costs				*Receipts, Remarks, etc.*
To Whom Due		*Amount*		
Plaintiff:	Attorney	20.00		
	Clerk	15.00	pd.	$35.00
Defendants:	Attorney	20.00		20.00
				$55.00 s/r/9-8-66P.

[fol. 2]

DOCKET ENTRIES

Date		
1966		
Aug. 19	(1)	Complaint, Exhibits A, A1, B, B1, C, and D, filed. (Service admitted)
" "	(2)	Application of Plaintiff to convene Three-Judge Court, filed. (Service admitted)
" "	(3)	Motion of Plaintiff for Preliminary Injunction and Memorandum in support thereof, filed. (Service admitted)
" 23	(4)	Notification and Request (Thomsen, C.J.) of filing of proceedings and for designation of a Three-Judge Court, filed.
" "	(5)	Designation of Haynsworth, Jr., C. J., Fourth Circuit, of Honorable Simon E. Sobeloff and Harrison L. Winter, Circuit Judges, and Honorable Roszel C. Thomsen, District Judge, to constitute a Three-Judge Court, filed.
" 26	(6)	AMENDED COMPLAINT, filed. (copy served)
" 31	(7)	Motion of Defendants to Dismiss and Memorandum in support thereof, filed.

Date 1966		
Sept.	1	— Hearing on Motion of Defendant to Dismiss before Simon E. Sobeloff and Harrison L. Winter, Circuit Judges, and Thomsen, C. J.
"	"	— Argued and held sub-curia.
"	8	(8) Opinion (Sobeloff and Winter Circuit Judges and Thomsen, Chief Judge United States District Court), filed. [Stamp] Micro Filmed Date Sep 8 1966
"	"	(9) Order (Sobeloff and Winter Circuit Judges and Thomsen, Chief Judge United States District Court) that Defendants' motion to dismiss be and is hereby granted; Complaint dismissed with costs to defendants, filed. [Stamp] Micro Filmed Date Sep 8 1966 (notices mailed 9/8/66 w.l.b, jr.)
"	13	(10) Notice of Appeal of Plaintiff and designation as to contents of Record on Appeal, filed.
Oct.	14	(11) Transcript of Proceedings before the Court on September 1, 1966, filed.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

HOWARD JOSEPH WHITEHILL, JR., 201 Cedar Street, Chestertown, Maryland, Plaintiff,

v.

WILSON ELKINS, President, University of Maryland, Administration Office, Regents Drive, College Park, Maryland,

BOARD OF REGENTS, University of Maryland, Administration Office, Regents Drive, College Park, Maryland,

J. JEROME FRAMPTOM, JR., President, State Board of Education, State Office Building, 301 West Preston Street, Baltimore, Maryland, Defendants.

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION AND DECLARATORY JUDGMENT—Filed August 19, 1966

1. Jurisdiction of this Court is invoked under the First and Fourteenth Amendments to the United States Constitution; 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3), 2201, and 2202; and further pursuant to 28 U.S.C. §§ 2281 and 2284.

2. This action is brought by the Plaintiff, Howard Joseph Whitehill, Jr., individually and on behalf of others similarly situated in position, for the purposes of enjoining enforcement of, and having this Court declare unconstitutional and void, the provisions of Article 85A, § 1 through 19, of the Annotated Code of Maryland (1957), otherwise known as the Subversive Activities Act of 1949, and more popularly called the "Ober Law", which, in its pertinent provisions applicable to this Plaintiff, as appear in Section 13, therein, which requires a statement of em-

[fol. 4] ployees, and Section 1, which sets forth definitions therein, and as further appears in Section 10 et seq., relating to alleged "loyalty", has the effect of preventing and prohibiting an individual from employment and receipt of compensation as a state employee unless and until he signs the oath required by such provisions.

3. The Plaintiff herein, Howard Joseph Whitehill, Jr., is presently a resident of Chestertown, Maryland and is engaged in teaching creative writing at the Johns Hopkins University and in the writing of works of fiction and of non-fiction and is a practicing member of the Religious Society of Friends, known also as Quakers.

4. The defendants, and each of them are respectively Wilson Elkins, the President of the University of Maryland; the Board of Regents of the University; and J. Jerome Framptom, Jr., Chairman of the State Board of Education, and they are fully and completely responsible for supervising, directing and otherwise controlling the enforcement of the activities and actions set forth in this complaint.

5. As a consequence of an understanding with the representatives of the University of Maryland at College Park, Maryland, the Plaintiff executed a written contract, a copy of which was not retained by him, for his appointment as a visiting lecturer in English during the academic year 1966-67, to be paid $7,000 on a ten month basis; the Plaintiff agreed to spend one day a week at the College Park Campus each semester, teaching two creative writing classes in 75-minute sessions, and making additional conference time available.

6. By a letter dated July 6, 1966 and signed by Dr. Charles D. Murphy, Head of the English Department of the University of Maryland, at College Park, the Plaintiff [fol. 5] received the contract and additional papers, includ-

ing what was denominated a "Certification of Applicant for Public Employment," which contained a loyalty oath, and which he was instructed had to be signed as a condition precedent to his appointment.

7. Attached hereto and made a part hereof as Exhibit "A" is the letter of July 6, 1966 and the "Certification of Applicant for Public Employment," which the Plaintiff had been directed to sign in order that his contract may be consummated and fulfilled by the representatives of the defendants and by the defendants themselves.

8. The Plaintiff executed the contract and, by letter of July 11, 1966, a copy of which is attached hereto and made a part hereof in Exhibit "B", he mailed it to Dr. Murphy, declining in a separate letter, enclosed therewith, however, to execute the "Certification of Applicant for Public Employment." Dr. Murphy, by letter of July 18, 1966, a copy of which is attached hereto and made a part hereof in Exhibit "B", advised the Plaintiff that the University of Maryland would not accept his services without such Certification first having been executed and filed by him.

9. The Plaintiff falls within the definitions of "state employee" given by the Attorney General of the State of Maryland to the University and filed by him in litigation, and thus falls within the class of persons required to execute such loyalty oath as a condition of employment by the State. Attached hereto and made a part hereof as Exhibit "C" is a copy of the opinion of the Attorney General, 45 *Reports and Official Opinions of the Attorney General* 187, dated April 8, 1960, defining state "employee" as including persons similarly situated as the Plaintiff.

10. The required loyalty oath is unconstitutional; it infringes upon the Plaintiff's rights to free and unfettered belief and opinion; its vagueness violates the requirements [fol. 6] of due process; it unconstitutionally shifts a burden to Plaintiff which instead rests upon the defendants;

Plaintiff should not be required to sign such oath and will not do so; his refusal to sign the oath is also a matter of conscience and your Plaintiff rests his refusal upon his fundamental rights of free speech, freedom of religion, due process and equal protection of law; and further the defendants' demand that the Plaintiff sign such loyalty oath is an unconstitutional exaction of Plaintiff's constitutional rights in exchange for employment; nevertheless, the Plaintiff will not sign such oath and as a result, the defendants and their agents or representatives will continue to refuse to execute the contract that had been agreed to by the parties, all to the damage, detriment and loss of constitutional rights of the Plaintiff.

11. The Plaintiff has attached hereto and made a part hereof in Exhibit "D", Sections 10 and 11 and 13 and 17 of the Subversive Activities Act, all of which provisions, regulations and procedures have been followed and executed and will continue to be followed and executed by the defendants and their agents, servants and employees; also included is the definitions Section, Section 1.

12. The said Sections of the said law have been interpreted by the State of Maryland and have been determined by the Court of Appeals of that State to be constitutional in the case of Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950).

13. As a consequence of the action of the defendants or such servants, agents or employees as are supervised by them, the Plaintiff and all others similarly situated in position, have been deprived and will continue to be deprived of their rights under the First and Fourteenth Amendments to the Constitution, and their rights under the Supremacy Clause of the Constitution of the United States; and such deprivation will continue unless the defendants are enjoined and restrained as prayed for herein.

[fol. 7] 14. The said damage and injury done to the Plaintiff and to all others similarly situated in position, by the defendants, is irreparable, and as a consequence thereof, there is no adequate remedy at law.

15. Under the contract that the Plaintiff signed, his teaching duties were to have begun in the week of September 19, 1966, and unless the relief prayed is granted with expedition, the Plaintiff will be irretrievably deprived of his constitutional rights as aforesaid.

Wherefore the Plaintiff prays as follows:

1. That as promptly as the business of the Court may permit, this Court should convene a Statutory Court of three judges, pursuant to Title 28, United States Code, Sections 2281 and 2284, for the purposes of granting a prompt and expedited hearing herein, and a determination of this cause.

2. That this Court should adjudge and declare to be in violation of the Constitution of the United States and as void for vagueness and otherwise void, unconstitutional and illegal, all provisions of the Statutes of the State of Maryland appearing in Article 85A, § 1, et seq., which have the effect of compelling the Plaintiff, as a visiting lecturer, and all others similarly situated, to sign a loyalty oath in the form prescribed and in accordance with the said Statute and policies and actions of the defendants herein, before being employed by the state or receiving state funds.

3. That this Court should issue a preliminary and permanent injunction restraining and prohibiting the defendants and those agents, servants and employees under their supervision and control and all other persons in active concert with them who receive actual notice of the Order of Court by personal service or otherwise, from enforcing, carrying out, executing, administering the provisions of Article 85A relating to statements required thereunder [fol. 8] for employment by the State or any agency thereof,

or any policies, practices or actions taken pursuant thereto; and further that the said parties should be restrained and enjoined from otherwise preventing the consummation of the Plaintiff's contract with the University of Maryland because of Plaintiff's assertion of his constitutional rights and his consequent refusal to conform with requirements of Article 85A, § 1 et seq., and his like refusal to conform with the policies, practices and actions of the defendants taken pursuant thereto.

4. That this Court should grant the Plaintiff, and all others similarly situated in position such other and further relief as to the Court may seem just and proper.

Howard Joseph Whitehill, Jr., Plaintiff.

Sanford Jay Rosen, 500 West Baltimore Street, Baltimore, Maryland 21201, Telephone: 955-7145;

Arnold M. Weiner, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, Telephone: 727-2800;

Elsbeth Levy Bothe, 41 West Preston Street, Baltimore, Maryland 21201, Telephone: 727-4425;

Joseph S. Kaufman, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, Telephone: 727-2800,

Attorneys for Plaintiff.

Service admitted—8/19/66, Robert C. Murphy, Dep. Att. Gen.

[fol. 9] *Duly sworn to by Howard Joseph Whitehill, Jr., jurat omitted in printing.*

Certificate of Service (omitted in printing).

[fol. 10]

"EXHIBIT 'A'" TO COMPLAINT

UNIVERSITY OF MARYLAND
COLLEGE PARK 20742

COLLEGE OF ARTS AND SCIENCES
DEPARTMENT OF
ENGLISH LANGUAGE AND LITERATURE

July 6, 1966

Mr. Howard J. Whitehill, Jr.
201 Cedar Street
Chestertown, Maryland

Dear Mr. Whitehill:

I apologize for the delay, but I have just received formal notice of the approval of Rudd Fleming's leave. I am glad therefore that I can now offer you an appointment as Visiting Lecturer (part time) in this department for 1966-67. The salary for this appointment would be $7,000 on a ten months basis.

The teaching program would be the one we agreed on when you visited the department. You would teach two creative writing classes each semester. Each class would meet for a 75-minute session (9:30 to 10:45 and 12:30 to 1:45) on one day a week, either Tuesday or Thursday as you prefer; and it is understood (since these courses usually meet two days a week) that conference time would be made available to the students at other hours on the day of the class meeting.

I am enclosing the contract and several other papers you need to fill out or sign if you wish to accept the appointment. I regret that it is apparently impossible on an appointment of this kind to avoid the tax withholding procedure.

I will be grateful if you can return the papers within a week, since I hope to clear up appointment formalities be-

fore I get away for a vacation. Please do not hesitate to call me collect if you have any question about the appointment. If you wish to have the students buy textbooks for the course, we will send in the order when we have the name of the book(s).

Sincerely yours,

/s/ CHARLES D. MURPHY
Charles D. Murphy
Head

CDM:vgp
Enclosure

[fol. 11]

"EXHIBIT 'A-1'" TO COMPLAINT

CERTIFICATION OF APPLICANT
FOR PUBLIC EMPLOYMENT

Required by Law (Art. 85A, Paragraph 13,
Annotated Code of Maryland, 1957)

"I, ..., do hereby cer-
(Print Name—including middle initial)
tify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

"I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

Date .....

Signature .....
(Name—including middle initial)

[fol. 12]

"Exhibit 'B'" to Complaint

July 11, 1966

Charles D. Murphy, Ph.D., Head
Department of English
College of Arts and Sciences
The University of Maryland
College Park, Maryland 20742

Dear Mr. Murphy:

Thank you for your letter of July 6. I am delighted to accept the appointment as Visiting Lecturer for next year, following the schedule you describe.

I return to you enclosed:

One Curriculum Vitae
Three completed Faculty Information Sheets
Three signed Appointment Contracts
Two completed Federal Withholding Cards
Another, independent letter to you, eyes only.

You will, I hope, be pleased to learn that Hiram Haydn has accepted my article, "Samuel Taylor Coleridge: Prisoner and Prophet of System," for publication in *The American Scholar*. The piece started as an amiable academic hoax, testing whether I was able to write the critical jargon in pursuit of an outrageous thesis: That Coleridge was the father of modern information theory. But the farther I went, the more persuasive became the parallels, and it ended as a very serious affair.

With continuing thanks for your courtesy, I am

Very truly yours,

Joseph Whitehill

[fol. 13]

"EXHIBIT 'B-1'" TO COMPLAINT

UNIVERSITY OF MARYLAND

COLLEGE PARK 20742

COLLEGE OF ARTS AND SCIENCES
DEPARTMENT OF ENGLISH LANGUAGE
AND LITERATURE

July 18, 1966

Mr. Howard J. Whitehill, Jr.
201 Cedar Street
Chestertown, Maryland

Dear Mr. Whitehill:

Thank you for your full statement of your views and reservations about the "certification of applicant for public employment" which is required for appointments at this university and which reads: "I, _____, do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence."

I am sure you understand that at this stage the formalities of the appointment have not been completed; and I have been informed by university officials that unless the certification is signed it is not possible under the law for the President of the University to give the approval that would be required to make the appointment effective. For this same reason, your proposal to teach without remuneration until a court decision is rendered is not an arrangement we can accept.

You will recall that when you visited my office I pointed out that such a certification was required, and that in my

letter offering you an appointment I enclosed the certification form as one of the "papers you need to fill out or sign if you wish to accept the appointment." Since this condition was explicitly stated, I am regretfully obliged to take your declining to sign the certification as a decision not to accept the appointment that was offered.

Sincerely yours,

/s/ CHARLES D. MURPHY
Charles D. Murphy
Head

CDM:amm

cc: Vice President Hornbake
Dean Charles Manning

[fol. 14]

"EXHIBIT 'C'" TO COMPLAINT

SUBVERSIVE ACTIVITIES ACT

LOYALTY PLEDGE REQUIREMENT OF ACT IS APPLICABLE TO PERSONS RENDERING OCCASIONAL INSTRUCTIONAL SERVICES FOR COMPENSATION, IN UNIVERSITY'S FORMAL INSTRUCTIONAL PROGRAM—"EMPLOYEE" DEFINED.

April 8, 1960.

Dr. Wilson H. Elkins,
President and Executive Officer,
University of Maryland.

You have asked whether the loyalty pledge provisions of the Subversive Activities Act of 1949 are applicable to persons who, while not appearing in the University Budget, and not listed as faculty members, render occasional instructional services for compensation in connection with certain formal credit bearing courses offered by the University. You state that the primary employment of such individuals is not with the University; and that the instruc-

tional service which they render in the University's program is much like a speaker's contribution, except that such service is rendered in association with, and as an integral part of a formal University course, and the individual may be asked to return semester by semester, or year by year. You further advise us that such persons are compensated for such instructional services by the University on a so-called "one-pay card" basis.

The Act in question, codified as Sections 1-19 of Article 85A, Annotated Code of Maryland (1957 Edition), provides in Section 10 that no subversive person as defined in the Act shall be eligible for "employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this State . . .". Section 11 provides, *inter alia,* that every board, department or other agency of the State which appoints or employs any persons, including teachers and other employees of any public educational institution in this State, shall establish procedures to ascertain whether such [fol. 15] person is a subversive person; and that in securing facts necessary to such determination the applicant shall be required to sign a statement containing answers to such inquiries as may be material. Section 13 provides in substance that all persons in the employ of the State shall be required to execute a statement that he or she is not a subversive person.

By letter of June 16, 1949, we advised you that it was unnecessary to secure loyalty pledges under this Act from persons invited to the University Campus for the specific purpose of delivering one or two lectures for a stipulated sum of money. In that instance, the speaker's contribution was in no way related to the University's formal instructional program and it was our opinion that such person was not, in the legal sense contemplated by the statute, an appointee or employee of the State.

It is, however, our opinion that the individuals now in question are employees of the University during that period of time that their services are engaged by the University in connection with its formal instructional program. Recently, in *Keitz v. National Paving Company*, 214 Md. 479, our Court of Appeals held:

> "... there are at least five criteria that may be considered in determining the question whether the relationship of master and servant exists. These are: (1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer. Standing alone, none of these indicia, excepting (4), seems controlling in the determination as to whether such relationship exists. The decisive test in determining whether the relation of master and servant exists is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done. It will be noted from the above, [fol. 16] it is not the manner in which the alleged master actually exercised his authority to control and direct the action of the servant which controls, but it is his right to do so that is important."

We conclude, therefore, that such individuals must execute the loyalty oath prior to undertaking instructional service with the University. If you determine that such individuals have previously executed the loyalty oath as required in their primary employment with another State agency, or with an institution receiving State aid, no duplication will be necessary before they may be permitted to serve the University in the stated manner.

C. FERDINAND SYBERT, *Attorney General.*

ROBERT C. MURPHY, *Assistant Attorney General.*

[fol. 17]

"Exhibit 'D'" to Complaint

ARTICLE 85A

Sedition and Subversive Activities

§1. *Definitions.*

For the purposes of this article:

"Organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force or violence.

"Foreign subversive organization" means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of, the United States, or of the State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control

of any foreign government, organization or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments of world federations, unions or governments to be effected through constitutional means.

"Foreign government" means the government of any country or nation other than the government of the United States or of one of the states thereof.

"Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, ~~or~~ of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization.

[fol. 18] *Loyalty*

§10. *Subversive person not eligible for governmental office.*

No subversive person, as defined in this article, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this State, or of any county, municipality, or other political subdivision of this State.

§11. *Rules and regulations to determine loyalty—In general.*

Every person and every board, commission, council, department, court or other agency of the State of Maryland or any political subdivision thereof, who or which ap-

points or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain before any person, including teachers and other employees of any public educational institution in this State, is appointed or employed, that he or she as the case may be, is not a subversive person, and that there are no reasonable grounds to believe such persons are subversive persons. In the event such reasonable grounds exist, he or she as the case may be shall not be appointed or employed. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury.

§13. Statement of Employees.

Every person, who on June 1, 1949 shall be in the employ of the State of Maryland or of any political subdivision thereof, other than those now holding elective office shall be required on or before August 1, 1949, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article, namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this article. Such statement shall be prepared and execution required by the State Commissioner of Personnel for

all persons whose employment is subject to the provisions of Article 64A of the Annotated Code of Maryland and by the city service commission of Baltimore for all employees whose employment is subject to the provisions of §§ 142 to 156 of the Baltimore City Chapter and by every person and every board, commission, council, department, court or other agency of the State of Maryland or any [fol. 19] political subdivision thereof responsible for the supervision of other employees, for employees under its jurisdiction. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this article shall immediately be discharged.

§17. *False statements constitute perjury.*

Every written statement made pursuant to this article by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this article, or (c) under oath in any hearing conducted by any agency of the State, or of any of its political subdivisions, pursuant to this article, or (d) in any written statement by an applicant for appointment or employment or by an employee in any State aid or private institution of learning in this State, intended to determine whether or not such applicant or employee is a subversive person as defined in this article, which statement contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury in Article 27, § 439 of the Annotated Code.

[fol. 20]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

[Title omitted]

APPLICATION OF PLAINTIFF FOR CONVENING OF THREE JUDGE COURT—Filed August 19, 1966

On grounds set forth in the verified Complaint filed herein, seeking a preliminary and permanent injunction and judgment declaring unconstitutional the provisions of the Statutes of the State of Maryland in Article 85A which compelled the Plaintiff to conform with such Statutes in order to commence his employment with the State by signing a statement of purported "loyalty", Plaintiff makes application for hearing of this cause and the motion for preliminary injunction, before a Three Judge District Court, in accordance with and pursuant to Title 28, Sections 2281 and 2284 of the United States Code; and Plaintiff further requests that the Chief Judge of the United States Court of Appeals for the Fourth Circuit be notified [fol. 21] pursuant to § 2284, Title 28, United States Code, of the presentation of Plaintiff's application for injunction, in order that the necessary designation of judges for said Court may be made.

Sanford Jay Rosen, 500 West Baltimore Street, Baltimore, Maryland 21201, Telephone: 955-7145;

Arnold M. Weiner, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, Telephone: 727-2800;

Elsbeth Levy Bothe, 41 West Preston Street, Baltimore, Maryland 21201, Telephone: 727-4425;

Joseph S. Kaufman, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, Telephone: 727-2800,

Attorneys for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 22]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

[Title omitted]

MOTION OF PLAINTIFF FOR PRELIMINARY INJUNCTION—
Filed August 19, 1966

The Plaintiff herein, on grounds set forth in the verified Complaint for Preliminary and Permanent Injunction and Declaratory Judgment and for reasons set forth therein, prays that this Court enter a preliminary injunction in accordance with the prayers therein on the grounds that, unless such injunction is issued in the form therein prayed irreparable damage will be done to the Plaintiff and that the Plaintiff has no adequate remedy at law, all of which is more specifically set forth in the Complaint contemporaneously filed herewith and which is prayed to be made a part hereof.

Wherefore, the Plaintiff prays that this Court enter a [fol. 23] Preliminary Injunction in the form prayed in the verified Complaint herein.

Sanford Jay Rosen, Arnold M. Weiner, Elsbeth Levy Bothe, Joseph S. Kaufman, Attorneys for Plaintiff.

MEMORANDUM OF POINTS AND AUTHORITIES

The Plaintiff's fundamental position can be stated succinctly:

First, the instant Act has been authoritatively construed and declared to be constitutional by the Court of Appeals for the State of Maryland in *Shub* v. *Simpson*, 196 Md. 177, 76 A.2d 332 (1950).

Second, in *Gerende* v. *Board of Supervisors*, 341 U.S. 56 (1951), a case involving the application of the Act at bar to candidates for political office, the Supreme Court affirmed the Court of Appeals for the State of Maryland, see 197 Md. 282, 78 A.2d 660 (1951), but restricted its ruling to a specified representation of the Attorney General of Maryland with respect to the language of the oath to be required under the Act.

Third, until very recently, the loyalty oath went further than the Attorney General's representation to the Supreme Court by demanding an averment that the signatory is not "a subversive person as defined by law."

Fourth, shortly after the Supreme Court's April 18, 1966 decision in *Elfbrandt* v. *Russell*, 384 U.S. 11, the Attorney [fol. 24] General caused the oath to be redrafted and given in its present form, see Exhibit "A" to the Complaint, which, but for the addition of the certification with respect to perjury, appears to conform to the representation made to the Supreme Court in *Gerende*.

Fifth, although it would appear that the oath before this Court generally fulfills the Attorney General's representation, this fact is not dispositive nor significant to the question at bar. Since *Gerende*, the Supreme Court has had occasion to pass upon a statute which has the precise and exact language of the Maryland definition of "subversive person" appearing in Section 1, Article 85A of the Maryland Code Annotated (1957). It struck down

that statute as unconstitutionally vague in *Baggett* v. *Bullitt*, 377 U.S. 366 (1964). And just this year, it voided the Arizona loyalty oath on the same ground. *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); see also, *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961). These cases control the issues, and the instant oath and statutes can find no present support in *Gerende*. See the dissenting opinion in *Baggett* v. *Bullitt*, 377 U.S. at 382, where Justice Clark lamented: "It is unfortunate that Gerende is overruled so quickly." And there can be no valid distinction between the statutes that guided the defendants here and those that guided the defendants in *Baggett* v. *Bullitt*. See 377 U.S. at 382 n. In addition, the requirement of a loyalty oath as a condition to public employment of this plaintiff, a Quaker who is barred by conscience and religion from executing such oaths, is an invalid condition on public employment in violation of the freedoms of religion, speech, and belief protected by the First and Fourteenth Amendments to the Constitution. See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

[fol. 25] There is no constitutional basis for the oath at bar; nor for the actions of the defendants in requiring its affirmation as a condition to the Plaintiff's employment. By granting this Motion, the Court will have firmly settled that fact.

Sanford Jay Rosen, Arnold M. Weiner, Elsbeth Levy Bothe, Joseph S. Kaufman, Attorneys for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 26]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

[Title omitted]

AMENDMENT TO COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION AND DECLARATORY JUDGMENT—Filed August 26, 1966

The Plaintiff, Howard Joseph Whitehill, Jr., by Sanford Jay Rosen, Esq., Arnold M. Weiner, Esq., Elsbeth Levy Bothe, Esq., and Joseph S. Kaufman, Esq., his attorneys, amends the Complaint by adding Paragraph 16 thereto, which reads as follows:

16. Not only the required "Certification of Applicant for Public Employment" but also the statute, particularly those provisions alleged in Paragraph 11 of the Complaint filed on August 8, 1966, pursuant to which such certification is given, is unconstitutional for the reasons set forth in Paragraph 10 of the Complaint and under the constitutional provisions set forth in Paragraph 13 of the Complaint; in addition, [fol. 27] such certifications and the statutory provisions pursuant to which they are given are also unconstitutional in that they constitute a prohibited Bill of Attainder in violation of Article I, Section 10 of the United States Constitution and further because, in violation of due process of law, they infringe upon the freedom expression, belief and conscience by denying appointment to persons who refuse to sign such certifications without affording them a hearing.

Sanford Jay Rosen, 500 West Baltimore Street, Baltimore, Maryland 21201, 955-7145;

Arnold M. Weiner, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, 727-2800;

Elsbeth Levy Bothe, 41 West Preston Street, Baltimore, Maryland 21201, 727-4425;

Joseph S. Kaufman, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, 727-2800;

Lee M. Miller, 11th Floor, One Charles Center, Baltimore, Maryland 21202, 752-6100,

Attorneys for Plaintiff.

[fol. 28] Certificate of Service (omitted in printing).

[fol. 29]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

[Title omitted]

MOTION TO DISMISS—Filed August 31, 1966

The Defendants move the Court as follows:

To Dismiss the Complaint for failure to state a claim upon which relief can be granted.

Thomas B. Finan, Attorney General of Maryland;

Robert C. Murphy, Deputy Attorney General;

Loring E. Hawes, Assistant Attorney General;

Julius A. Romano, Assistant Attorney General, 1200 One Charles Center, Baltimore, Maryland 21201, 539-5413,

Attorneys for Defendants.

[fol. 30] Certificate of Service (omitted in printing).

[fol. 31]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Civil Action No. 17564

[Title omitted]

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS—
Filed August 31, 1966

As a statutory precondition to employment with the State of Maryland, or any of its political subdivisions, all persons seeking such employment (with certain exceptions not here pertinent) are required to execute a statement under oath entitled "Certification of Applicant for Public Employment", which reads as follows:

> "I, ..., do hereby
> (Print Name—including Middle Initial)
> certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27 of the Annotated Code of Maryland (1957 edition)."

[fol. 32] The University of Maryland, an agency of the State of Maryland, declined to employ Plaintiff Whitehill as a Visiting Lecturer in a formal credit-bearing course solely by reason of his refusal to subscribe to the aforegoing Certification. As such Certification has its roots in the provisions of the Subversive Activities Act of 1949, commonly known as the "Ober Act", and particularly Sections 10-13 thereof, Plaintiff's Complaint for Preliminary and Permanent Injunction and Declaratory Judgment seeks a judgment declaring unconstitutional all pro-

visions of the Act in question which have the effect of compelling him, as a condition of employment with the State, to sign the cited Certification (sometimes denominated a "Loyalty Oath") in the form above prescribed. Plaintiff asserts that the statement in question violates, *inter alia*, his constitutional guarantees of freedom of speech, association and religion, and, additionally, that said Certification is unconstitutionally vague in violation of the due process requirement of the Fourteenth Amendment, and that the statement ("Loyalty Oath") and the statutory provisions pursuant to which it is required are also unconstitutional as a prohibited Bill of Attainder in violation of Article 1, Section 10, of the United States Constitution.

It is the State's position that it may, pursuant to its police power, require execution of the "Certification of Applicant for Public Employment", in the form above prescribed, as a condition of public employment, and that such requirement does not run counter to any provision of the Constitution of the United States.

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[fol. 53]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

No. 17564 Civil

HOWARD JOSEPH WHITEHILL, JR.,

vs.

WILSON ELKINS, President, University of Maryland, Administration Office; BOARD OF REGENTS, University of Maryland, Administration Office; J. JEROME FRAMPTON, JR., President, State Board of Education.

Transcript of Hearing—September 1, 1966

Baltimore, Maryland

The above-entitled case came on for hearing before The Honorable Simon E. Sobeloff, United States Circuit Judge, The Honorable Harrison L. Winter, United States Circuit Judge, and The Honorable Roszel C. Thomsen, Chief Judge, United States District Court for the District of Maryland, at 10:00 o'clock a.m.

APPEARANCES:

For the Plaintiff:

Sanford Jay Rosen, Arnold M. Weiner, Elsbeth Levy Bothe.

For the Defendants:

Robert C. Murphy, Loring E. Hawes, Julius A. Romano.

[fol. 54]

TRANSCRIPT OF PROCEEDINGS

The Clerk: The matter pending before the Court: Civil Action No. 17564, Howard Joseph Whitehill, Jr. vs. Wilson Elkins, President, University of Maryland, et al. Hearing on constitutionality of First and Fourteenth Amendments.

Attorneys for the plaintiff: Sanford Jay Rosen, Arnold M. Weiner, Mrs. Elsbeth Levy Bothe.

Attorneys for the defendants: Robert C. Murphy, Loring E. Hawes, Julius A. Romano.

Mr. Murphy: May it please the Court, we have a motion to dismiss filed to the complaint and I don't know whether it's proper to argue that at this point or just what the Court's pleasure might be.

Judge Sobeloff: I suppose since you are the movant, we will hear from you first.

Mr. Murphy: May it please the Court, the complaint in this case as filed by Professor Whitehill, as Your Honor knows, under Maryland law, as a precondition of public employment, all applicants are required to certify what is commonly known as a loyalty oath, more properly called, I think, a loyalty pledge. The actual name given to it is "Certification of Applicant for Public Employment."

That certification, the one that is presently involved before the Court, is that: "I, ..., do hereby [fol. 55] certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence." The certification is required under the penalties of perjury.

Professor Whitehill and the University of Maryland were in contractual negotiations to employ Professor Whitehill. The University would have employed the Professor but for his refusal to execute the loyalty pledge.

As a result of that refusal, the Professor has filed the instant action for declaratory judgment or an injunction

to declare the provisions of the Subversive Activities Act of 1949, commonly called the Maryland Ober Law, unconstitutional, together with those statutes which compel the execution of the loyalty certification.

At this point, I might say, to digress for a moment, in Paragraph 8 of the plaintiff's complaint, reference is made to correspondence between himself and the University concerning their contractual relationship.

In Paragraph 8, the complaint alleges that the Professor's reasons for declining to sign the Maryland certification were contained in a separate letter. That letter has not been included as an exhibit in the complaint. I believe it's an inadvertence and my brothers have no objection to having it included, and it sets forth in three-page detail [fol. 56] the Professor's reasons for declining to sign the oath.

Judge Sobeloff: I suppose there is no objection.

Mr. Weiner: There is no objection.

Mr. Murphy: I wonder if the Court will want to suspend long enough to read that letter. I think it's somewhat significant.

Judge Sobeloff: All right, sir.

(Document handed to the Court by the Clerk.)

Judge Winter: I think you may continue, Mr. Murphy.

Mr. Murphy: The grounds assigned by the plaintiff for seeking to have the Ober Law declared unconstitutional are basically those of freedom of speech, association, religion, unconstitutional vagueness, Bill of Attainder, and I might add at this point that it appears from the memorandum of the petitioner that they have abandoned the religious claim. I see nothing in there in support of the religious claim and I believe that is possible, although our motion to dismiss goes into the religious contentions of the plaintiff.

I might say also that there is nothing in the Maryland certification whereby the Professor is required to swear.

It simply is a certification. It's not basically an oath; it's loosely referred to as an oath and traditionally, they've been referring to similar statements as oaths, but I think [fol. 57] technically it is not that. It is simply a certification under the penalties of perjury.

Of course, the State takes the position that loyalty certification is entirely proper as part of the State's exercise of its police power and it does not run counter to any constitutional guarantees whatsoever.

Very briefly, if Your Honors please,—I think you're all familiar with the legislative and historical background of the Ober Law, but briefly, to familiarize Your Honors again with it, the General Assembly of Maryland at its 1947 session proposed an amendment to the Constitution to prohibit those individuals who advocated violent overthrow of the Government, State or Federal, from holding public office of any kind, elective or appointive, in the State of Maryland.

That amendment was approved by the people by a vote of 202,000 to 84,000 in 1948 and it became Section 11 of Article 15 of the Maryland Constitution.

In that same year, there was a special session of the General Assembly of Maryland, at which time Senate Joint Resolution No. 2 was passed, directing the Governor to appoint a Committee on Subversive Activities to study the laws of the United States and the several states and to prepare a legislative program for the protection of democratic principles of government and ideals in this State. [fol. 58] That Commission was appointed; it became known as the Commission on Subversive Activities, with Frank B. Ober as its Chairman.

The Commission reported; its report covered over 115 pages, together with a proposed draft of a bill. The Legislature basically enacted the substance of the recommendations of the Ober Commission and that is now the Subversive Activities Act of 1949, Chapter 86 of the Acts of 1949.

As the Court also knows, that Act contains a very extensive preamble, numerous recitals by the Legislature of its findings with respect to the subversive activities threat to this country at that time.

Very briefly, it stated that there existed a worldwide Communist movement, under the domination of a foreign power, and it set forth the objectives of that movement, with which we are, I am sure, all familiar.

It goes on to say that there are other subversive groups, other than the Communist Party, which have such objectives. It sets forth that one of the methods adopted by subversive persons and organizations render it imperative that the loyalty of persons entering the public employment of the State of Maryland be definitely established.

One of the methods again cited by the preamble was the infiltration into places or positions in the Government in an effort to overthrow it.

[fol. 59] The Act itself is divided into two sections, one under the heading of "Sedition", which is not directly involved here, and the other under the heading of "Loyalty", which is.

The sections under "Sedition" give the basic definitions of subversive person, subversive organization and so forth, and set forth and make it a felony to commit certain subversive type of—or engage in certain subversive type activity, as defined in Section 3 of the Act. It imposes upon the Attorney-General the duty of enforcement, as well as other officials.

The sections of the Act under the "Loyalty" subheading basically proscribe any individual who is a subversive person as defined by law from eligibility for employment with the State or any of its political subdivisions.

The individuals employed by the State as of June 1, 1949 were required to take the oath in the form set out in Section 13, which I think was drawn at that time. As to new employees, prospective new employees, they were required to execute an oath, which, as a practical matter, was basically the same as that executed by the employees

in 1949. As the Court knows, that oath was changed around 1951.

The point I'm trying to make is that new employees are signing the same form of oath as were former employees.

[fol. 60] Section 15 of the Act requires a loyalty pledge from certain elective public officers, or individuals seeking public office as a condition to have their names included on the ballot.

There is a very broad severability clause contained in Section 18 of the Act.

Now, in pursuance of the statutory mandate, the plaintiff was required to sign the certification that I have just alluded to in the form as is stated in our memorandum and as I have just stated here.

In our judgment, it is this certification, not any other certification, but this certification which is involved in this case, together with any statutes that may compel execution of it. Nothing else is involved.

I believe there is an effort here to strike down the entire Act. We don't feel that the plaintiff has standing to attack the entire Act. He simply has declined to execute the certification, and that is all that is really directly involved at this time.

Judge Winter: Mr. Murphy, could you explain to me what is presently the Attorney-General's position on the form of certification which you are requiring? Clearly, it is not nearly as broad as that which is provided for in the Act, and I think you stated that as a factual matter, around 1950 or 1951, this shortened form began to be used, is that [fol. 61] correct?

Mr. Murphy: That was the outgrowth of the case of Shub vs. Simpson in the Court of Appeals of Maryland and Gerende vs. Board of Supervisors of Elections in the Supreme Court of the United States, a judicial construction of what was required. I was about to come to that, Your Honor.

Judge Winter: Of course, the Supreme Court of the United States said they read the Shub case as saying that only the shortened form of oath was required.

I find it a little difficult to reach the same conclusion, reading the Shub case, just on my own, but be that as it may, has only the shortened form of oath been used constantly since 1950 or 1951?

Mr. Murphy: Well, there are two forms of oath, Your Honor, that have been used since '51, and they are basically the same except that the one that preceded May of '66 stated that: I am not a subversive person as defined by law, namely, that I am not a person who is engaged in one way or another in the attempt to overthrow the Government of the United States. They used the words "subversive person as defined by law" but then did not proceed to use the definition—

Judge Winter: The definition provided by the statute.

Mr. Murphy: —of Section 1. They used the definition [fol. 62] that was approved by the Supreme Court, the effect of which, in my judgment, is a judicial amendment of the term "subversive person" in Article 85A of the Code of Maryland. The Supreme Court has clearly treated it that way, and to dispel any doubt that the Supreme Court did not know what was before it at the time, the brief of the Attorney-General before the Supreme Court in the Gerende case states just what is involved.

It will just take a moment. Page 15 of the State's brief in the Supreme Court in the Gerende case says: "It thus appears that not only is the Ober Law a tightly and carefully drawn statute but that it has received a scrupulously restricted construction by the Court of Appeals which limits its impact to persons committing or advocating acts directly affected or connected with the violent overthrow of the Government."

Again on Page 25 of the State's brief: "The appellees, again calling to the attention of the Court that the Ober Law is a carefully and tightly drawn law, carefully limited by the Court of Appeals of Maryland, respectfully suggest

the following is the true state of the law on this subject," and then it proceeds to set this forth.

There is no question that the argument of the Attorney-General before the Supreme Court was predicated on the basis of a judicial construction much narrower than the [fol. 63] Section 1 and Section 13 definition of a subversive person.

Judge Winter: Would you go so far as to say that the Attorney-General would concede that the oath as literally prescribed by the statute could not be required under some decisions of the Supreme Court?

Mr. Murphy: Yes. Yes, sir.

Judge Winter: In other words, that if you attempted to have a person swear or affirm or certify under penalties of perjury that he was not a subversive person, that that definition would be unconstitutionally broad?

Mr. Murphy: Under Baggett vs. Bullitt, it would be, yes, sir, no question about that.

Judge Thomsen: Now, since that, in May 1966, you made an amendment to the certificate.

Mr. Murphy: That was a result of Elfbrandt.

Judge Thomsen: As a result of the Elfbrandt case, you softened it a little bit from even what the Supreme Court had theretofore approved, is that it, by taking out—

Mr. Murphy: Yes, Your Honor.

Judge Thomsen: —the second clause?

Mr. Murphy: Just mere knowing membership, under the Elfbrandt decision, is not sufficient. It was somewhat vague and it's even possible that the State could not require such a pledge.

Judge Sobeloff: Is it your view that the Gerende deci- [fol. 64] sion was modified by Elfbrandt?

Mr. Murphy: Oh, definitely not, Your Honor. Neither Baggett or Bullitt or Elfbrandt purport to overrule Gerende. As a matter of fact, they both carefully preserve it, in our judgment.

Judge Winter: The majority in Bullitt say that they are not overruling it; they are distinguishing it.

Mr. Murphy: That's correct.

Judge Winter: Of course, the dissenters say the majority is overruling it. Then in Elfbrandt, the majority is silent on Gerende and the dissenters do not say that they have overruled it but they, I think, make somewhat of a passing remark that it is hard to see how the majority could have reached that decision in the light of Gerende and some other cases.

Mr. Murphy: That's what we think. We say that actually in those two cases, there is support for the continual vitality of Gerende. I don't think there is any question about it, and if I could develop into that point and make a—

Judge Winter: To prevail, you do not have to argue that Elfbrandt supports Gerende; all you have to do is to say it does not adversely affect it.

Mr. Murphy: I agree, Your Honor, but I think that the impact of the decision is such that it does support [fol. 65] Gerende and I would like to use it affirmatively, rather than simply trying to guard against it.

Going back to 1950 in the Maryland Court of Appeals case of Shub vs. Simpson, that was a broad-based constitutional attack on the Ober Law. It had all the contentions that are present in this case, violation of free speech, constitutional vagueness.

The Court there, after noting all the factual recitals in the preamble of the Act and finding justification for the basis—of the necessity for the passage of the Act, went on to say that it is—referring to its purpose, "That it is to prevent infiltration in our state, county or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government by force or violence." It was that phrase that indicated in the Court of Appeals' mind the total scope of the required loyalty pledge.

The Supreme Court, as we just mentioned, in the Gerende case,—which certainly enjoys something rather unusual nowadays, unanimity in the Supreme Court—stated

very briefly that: "We read this decision to hold that to obtain a place on the Maryland ballot, a candidate need only make oath that he is not a person who is engaged in one way or another in the attempt to overthrow the government by force or violence, and that he is not knowingly a member of [fol. 66] an organization engaged in such an attempt."

That latter phrase has since been stricken from the Maryland loyalty pledge, based on Elfbrandt, but that is not the certification that the plaintiff was asked to sign. He has been asked to sign that very brief certification that he disavows any intention to overthrow the Government of the United States, the State or the county.

Judge Sobeloff: But does your alteration in the form of the oath made in May after the Elfbrandt decision indicate that in your view, Elfbrandt narrowed the possible scope of the oath as approved in Gerende?

Mr. Murphy: Yes. I would say, Your Honor, out of an abundance of caution—it's not at all clear, but out of an abundance of caution, we struck that last phrase out. It didn't add a whole lot, in our judgment.

There was much confusion between Bullitt and Baggett and Elfbrandt. If Your Honors recall, Bullitt and Baggett was written by Mr. Justice White. He led the dissenters, the three dissenters in Elfbrandt, so even between the Court, I'm not entirely sure that they all agreed on what they were saying, but again, out of an abundance of caution—we wouldn't concede that it was necessary but out of an abundance of caution, we did strike it.

Again I do point, and I think with some impact, to the fact that the Attorney-General of Maryland did argue be- [fol. 67] fore the Supreme Court—perhaps you can't get it out of the Gerende decision itself—that the judicial construction of the definition of a subversive person in the Maryland Act was such that all that was required was the oath that we now have before the Court, that and that alone.

I think the basic thrust or the principal thrust of the petitioner's argument is on unconstitutional vagueness. He

finds a great deal of solace in Bullitt and Baggett. It's true that the Washington loyalty oath, which was struck down in that case, contained the identical definition of a subversive person as is contained in the Maryland Act.

Section 1 of the Maryland Act and the Washington oath that was struck down are identical. The difference, of course, is that we do not use since Gerende, since 1951, the definition of a subversive person contained in the Act.

Again, I come back to what's really involved here. It's the certification that the Professor was asked to sign, not some other certification, that and that alone, and again we say on the question of unconstitutional vagueness, that this Court has to look no further than Gerende, which withstood an attack on constitutional vagueness. You have to go no further, and since Gerende, the allusions to Gerende in Cramp and Alder are such, in our mind, that again say they have continuing vitality.

No case, certainly not expressly or by any implication, [fol. 68] has ever overruled Gerende. In the last three years, the Court of Appeals has had these two cases, Bullitt and Baggett and Elfbrandt, right squarely before them. If they intended to overrule Gerende, they wouldn't have attempted to distinguish it.

As you recall, in Footnote 7 of Bullitt, they went to great pains to distinguish it, so that I say, or the State says that it has continuing vitality.

Basically, in determining whether a loyalty oath is unconstitutionally vague, the test seems to be whether it is set out in "terms susceptible of objective measurement." That was the test that was employed in Cramp; it was restated in Bullitt and Baggett.

Again in the Baggett case, there was an inference to the effect that had the Washington oath been based on violent overthrow of the Government or advocacy of violent overthrow of the Government directly that it would have been—it would have met the test of "terms susceptible of objective measurement."

The Alder case cited in the State's memorandum in support of its motion to dismiss clearly supports the nonvagueness of the Maryland oath. The definition there of a subversive organization was "one that teaches and advocates the overthrow of the government by force or violence." It's true that that case was back in 1952 but it's [fol. 69] been many times cited by the Supreme Court and never been overruled.

I might, on the question of constitutional vagueness, Your Honors, draw attention to the judicial construction of the Smith Act, approved by the Supreme Court of the United States in Dennis vs. U. S. That was another case where it was argued that the Smith Act advocacy provisions were vague. The Supreme Court interpreted them in a fashion to make them constitutional, so that it was advocacy of action for the accomplishment of the overthrow of an organized government which they construed the criminal provisions to be in that case, and again in Baggett, they refer to Dennis and say that that judicial construction by the Supreme Court is still valid.

The only vice in Elfbrandt, as we could see, was the fact that the oath there proscribed mere knowing membership in a subversive organization. The Court said, you need something more; you have to show some affirmative act.

Judge Winter: They were faced with the possibility that an organization may have subversive purposes and nonsubversive purposes, and in effect, didn't they say that if you are going to make membership in such an organization a disqualification, you have got to require not only that they know of the subversive purposes but that they subscribe to the subversive purposes, to guard against the possibility, well, they may think that the subversive pur- [fol. 70] poses are not effective and they are in favor of the nonsubversive purposes and they join the organization and assist it and support it for nonsubversive reasons?

Mr. Murphy: I think that's precisely correct, Your Honor. That is our understanding of it.

On the question of constitutional vagueness, I again come back to the very oath that's involved. No other oath is involved here. It has the sanction of a Supreme Court decision and any infirmities that might have been contained in it by reason of Elfbrandt have been removed. This is the oath that the State of Maryland asks its prospective public employees to take.

Judge Winter: Coming back to the oath itself, what do you think the phrase "in one way or another" means?

Mr. Murphy: I think it probably means in any way, or by any available means. I think it means in one way or another, precisely what it says. It's unfortunate that the English language lacks the precision which perhaps we might like it to have, but I think it means just that: In one way or the other, in any way.

Judge Sobeloff: Could it mean by paying dues to an organization?

Mr. Murphy: I'm sorry, Your Honor?

Judge Sobeloff: Could it mean by paying dues to an organization?

[fol. 71] Mr. Murphy: That's kind of a passive act. I think paying dues to an organization would not be sufficient.

Judge Sobeloff: Would it be unreasonable to interpret that as a meaning then?

Mr. Murphy: I think, in my judgment, it would, Your Honor.

Judge Sobeloff: But under Elfbrandt, that would not be enough to proscribe the person, would it?

Mr. Murphy: That's right. Simply—

Judge Sobeloff: Now, if you take that view, could a rational person interpret the words "in one way or another" as including some of the things which Elfbrandt says may not be included in the oath?

Mr. Murphy: I think he could, Your Honor. I think it would be fishing to find some confusion in a simple statement that I am not engaged in one way or another in the attempt to overthrow the government by force or

violence. The key word, in my judgment, is "attempt," "engaged in the attempt."

If you look at Black's Dictionary for the definition of the word "attempt," it says: "Attempt means an intent combined with an act falling short of the thing intended," so that perhaps the word "attempt" would mean the intent to overthrow by force or violence, coupled with an act in furtherance of that intent.

[fol. 72] Judge Sobeloff: What I am asking you to address yourself to—and I am really unclear about it; maybe you can help us—is the phrase "in one way or another" any less vague than the things that Justice White condemned in the Washington case?

Mr. Murphy: I don't think it's vague at all, Your Honor. The Supreme Court didn't find it vague in Gerende.

Judge Sobeloff: You say that "in one way or another" may include payment of dues to an organization.

Mr. Murphy: No, I don't say that.

Judge Winter: No, I think he said the other.

Judge Sobeloff: I see.

Mr. Murphy: I don't say that.

Judge Thomsen: It would not be enough; you would have to have intent. It would be if you had intent but not unless you had intent.

Judge Sobeloff: Could a person reading the oath and with those words, reasonably so interpret it?

Mr. Murphy: We argue that he can't. We argue that—

Judge Sobeloff: That he can or cannot?

Mr. Murphy: That mere dues paying would be prohibited by this?

Judge Thomsen: Mere dues paying without intent, you [fol. 73] said.

Mr. Murphy: Yes, sir.

Judge Sobeloff: You say that that would not be enough to proscribe the person?

Mr. Murphy: That's right.

Judge Sobeloff: But I am asking you whether you think a reasonable person might interpret the words the

other way, even though you do not agree with that interpretation?

Mr. Murphy: Well, if we take the reasonable person, I would say that he would have to say to himself that he is not engaged in the attempt to overthrow the Government simply because he pays dues to an organization which may be subversive. I think that's an unreasonable—

Judge Sobeloff: You think that would be clear to him?

Mr. Murphy: It would to me, and perhaps I'm reasonable.

Judge Sobeloff: I would amend by striking out the word "perhaps."

Mr. Murphy: I think that this oath is certainly not susceptible to an undefined variety of guiltless but knowing behavior, which was talked about in Elfbrandt and in Baggett, an undefined variety of guiltless but knowing behavior.

[fol. 74] A person who is engaged in an attempt is not guilty. He's guilty if he is engaged in an attempt to overthrow the government.

We're not simply talking of advocacy of discussion. This is advocacy of action, at the least. This is the distinction that the Supreme Court made in the Dennis case. They said that the Smith oath did not simply mean passive advocacy or abstract advocacy, or even just plain discussion. It was an advocacy of action in the Dennis case which saved that provision from the vice of unconstitutional vagueness.

Certainly our certification is far clearer, in my judgment, than the Smith Act provision, which the Supreme Court expressly saved in Baggett. Again we are limited to the precision of the English language, but if this doesn't carry the day, then I don't know what could possibly be used to do so.

Judge Sobeloff: Has the Keyishan case been set down for argument in the Supreme Court?

Mr. Murphy: Your Honor, I know that they have noted probable jurisdiction. Perhaps Professor Rosen knows.

Judge Sobeloff: They did that last January, did they not? When did they note—

Mr. Rosen: I believe it was in June or July probable jurisdiction was noted?

Judge Sobeloff: But no date has been set?

[fol. 75] Mr. Rosen: No date for argument.

Mr. Murphy: I'm told, Your Honor, by Mr. Romano that he talked to Mr. Davis at the Supreme Court and they expect to have argument in November. We'll be glad to suspend the proceedings until that time, if Your Honors would like.

Judge Sobeloff: What happens to Mr. Whitehill in the meantime? I suppose Mr. Whitehill would be agreeable, too, if you would let him teach in the meantime.

Mr. Murphy: In his letter which we have just put in as an exhibit, he says he doesn't really need the money, and I think the thrust of the letter is actually something of a conspiratorial plot to set up a case to have this thing argued. He really has no personal interest in it. Apparently, he's abandoned—

Judge Sobeloff: Would he be permitted to—

Mr. Murphy: No.

Judge Sobeloff: Even if the wages were withheld, would he be permitted to teach?

Mr. Murphy: Not in my judgment, Your Honor. We consider this a prerequisite, a statutory prerequisite that no one can waive other than the Legislature.

Judge Sobeloff: So the delay is no solution from his point of view.

Mr. Murphy: No, but it is from ours.

Judge Sobeloff: Yes, I understand.

[fol. 76] Mr. Murphy: Your Honors, I'd like to pass very briefly to the free speech aspects of the plaintiff's complaint. There, I think it's certainly axiomatic to say that the right of free speech is hardly an absolute right, that it must give and bend to reasonable regulations of the State which do not unduly infringe that freedom.

No less than three cases in the Supreme Court, all of which are cited in our motion, support the proposition

that the State can condition public employment upon a reasonable loyalty certification: Garner, American Communications Association vs. Douds, Alder, and even Gerende implicitly. Baggett and Bullitt recognizes that proposition also, as does Cramp vs. Board of Public Instruction, two very late cases.

I don't think there is any doubt that the State can condition its employment by requiring—or by prohibiting such employment to those people who do what this oath says: Engage in the attempt to overthrow the government. Certainly, anyone so engaged would not be a fit candidate for public employment.

All this regulation does is to weed out from public employment those individuals who, if employed, would work toward the overthrow of the government.

We are not proscribing free speech. There is nothing in this oath that relates to speech at all. It's conduct; con- [fol. 77] duct, not speech.

I think the petitioner here would find great reliance in Speiser vs. Randall, a case in 1958 in the Supreme Court.

Judge Winter: Excuse me, Mr. Murphy. Except that if you had somebody who was going around making public lectures advocating forceful revolution or violent revolution, would not that be engaged in one way or another in the attempt?

Mr. Murphy: I think very definitely, Your Honor, very definitely.

In Speiser vs. Randall, the Supreme Court there struck down a loyalty oath which was required as a condition for eligibility for a veteran's tax exemption. It was a rather rambling opinion; I have read it two or three times without understanding it too well, but it's a far different situation than we have here, and the Speiser Court was careful to point out that there was a large distinction between what it was doing in that case and in the loyalty certification cases.

It expressly stated, referring to Garner, Gerende and Douds: "In these cases, however, there was no attempt

directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. The principal aim of those [fol. 78] statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be used to the detriment of the public."

I think there is a clear, clear distinction between the Speiser situation and the situation in Garner, Gerende and Douds. Certainly if it is not clear, Konigsberg vs. State Bar of California, a case in 1961 cited in our motion, makes it clear that the Speiser principle is limited to where there was an intent to penalize certain beliefs.

There, as the Court knows, California's right to deny admission to the Bar of an individual seeking such admission was upheld where he declined to answer the Bar Committee's inquiries as to whether he was a Communist. The Court in Konigsberg stated: "Speiser was explicitly limited so as not to reach cases where, as here, there is no showing of an attempt to penalize political beliefs," so I think the distinction is certainly quite clear.

The freedom of religion aspects of the plaintiff's complaint have been covered somewhat briefly in our motion to dismiss. I won't go into them here, if Your Honors please, because it appears to have been abandoned.

Similarly, the question as to whether the loyalty certification and the statute compelling it in the Ober Law is a prohibited Bill of Attainder has been completely and totally answered in the Garner case, a far more difficult [fol. 79] case than our present one. In Garner, we were dealing with past loyalty. Our oath is totally prospective. It was upheld in Garner.

Garner remains the law, and the question of Bill of Attainder was involved in the case now pending in the Supreme Court of the United States, to be argued in November, the Keyishan case where the New York three-Judge Court found the Fineberg and associated laws of New York not to be Bills of Attainder. We have no difficulty with that point here, Your Honors.

Finally, we would draw the Court's attention to the fact that the Defendant Frampton, as the President of the State Board of Education, is not a proper party in this case. He exercises absolutely no direction or control of the University, which is an automatic unit of our Government, the management of which is vested totally in the Board of Regents, which is a proper party.

In our motion, Your Honors, we would conclude here with—

Judge Winter: Mr. Frampton is not ex officio a member of the Board of Regents, is he?

Mr. Murphy: No, he is not, Your Honor.

We would conclude by again saying—perhaps getting back to basics, sometimes which we lose sight of in this maze of refined thinking through the Supreme Court's numerous [fol. 80] cases on vagueness—that the Maryland loyalty certification serves a very limited end. It simply provides a means where the State seeks to prevent people from working for it who are doing what this oath says, who are engaged in the attempt to overthrow the Government.

It appears that the plaintiff in reality is challenging the right of the State to condition public employment. It's certainly not couched in that language but I think that's what it really boils down to. Does a person who wants to work for the State and who may be engaged in the effort to overthrow it have a right, a constitutional right, perhaps supported by First Amendment guarantees, to do that very thing? I hope not. I think if that is so, then there has been a large change in constitutional law in the last five years.

We would respectfully state that in our judgment, the complaint fails to state a cause of action and that it should be dismissed.

Judge Sobeloff: Thank you, sir.

Judge Winter: Thank you, Mr. Murphy.

Mr. Rosen: Your Honors.

Judge Sobeloff: Mr. Rosen.

Mr. Rosen: Judge Winter asked what particular certification the State now demands. That particular certification, of course, is attached to the plaintiff's complaint as [fol. 81] Exhibit A-1. As Attorney-General Murphy indicated, it differs from the one that was used by the University up to May 3, 1966 in some details.

If you will, Your Honors, I think it would be appropriate if the Court—

Judge Sobeloff: Why are we concerned about the former oath? Let us assume that it was objectionable,—

Mr. Rosen: All right.

Judge Sobeloff: —is that the question before us today?

Mr. Rosen: I think that is only a part of the question before this Court, Your Honor, but it is the most essential part. We are concerned with the former oath because the Attorney-General and the University makes its defense based upon Gerende, the 1951 case in the Supreme Court in which, according to the Attorney-General, the Court upheld a specific oath, or an oath in a specific form.

In the light of Elfbrandt, the Attorney-General then revised the oath. We submit the Attorney-General had no power to revise the oath.

Judge Winter: Assuming that he had no power to revise the oath, Mr. Rosen, where does that get you? Let us assume that the part of the pre-May 3, 1966 oath which said that he was not a subversive person, namely, with whatever definition, let us say that that was unconstitutional. Under [fol. 82] the severability clause in the Ober Act, are we not left then with the oath which is being administered?

What I am saying is, in other words, to prevail, do you not have to sustain the attack on the exact language which was sought to be extracted from Mr. Whitehill in this case?

Mr. Rosen: No, Your Honor, I don't think so. First of all, the certification that the Attorney-General uses now refers the affiant directly to Section 13, which, despite the severability clause, speaks of membership, as well as being

a subversive person. It also formerly referred the affiant to the entire Act containing all of the various definitions.

In Baggett and Bullitt, the Court—

Judge Winter: You say refers to Section 13. All it does is under the title "Certification of Applicant for Public Employment" say "Required by Law" and then they cite Article 85A, but can't we construe that as meaning simply to the extent validly required by Section 13?

Mr. Rosen: For one thing, the reasonable person reading Section 13 wouldn't know that. For another thing, he wouldn't know it until there were—

Judge Winter: The reasonable person only reads what he is going to sign,—

Mr. Rosen: No, I don't think so, Your Honor.

[fol. 83] Judge Winter: —and what he is going to sign does not have the language of Section 13.

Mr. Rosen: Judge Winter, I think a reasonable person reads the entire statute. If he's signing a statute that renders him liable to a perjury conviction for false swearing and the certification on its face refers him to a statute, I think a reasonable person will read the statute, and besides, I don't see how the Attorney-General can take advantage of the severability clause, as the Attorney-General. That's a judicial act, or it involves a judicial act of construing the statute in the light of the Supreme Court's latest decisions, whereas the Supreme Court in Gerende, reading the Court of Appeals' decision in Shub said, this is what the Court of Appeals of Maryland said this Act means so far as the certification is concerned.

It means, one, a man must say that in one way or another —whatever that means now—he is not engaged in the attempt to overthrow the Government, and he is not knowingly a member of such an organization, in essence.

Now, it's clear that under Elfbrandt, that is no longer good, yet the dispositive gloss placed upon the oath requirement by the highest Court of the State still keeps that section in. I don't see how the Attorney-General can take it out by himself.

In addition, in Baggett, you will recall, as we indicate in [fol. 84] our trial memorandum, Justice White in Footnote 7, which itself is rather obscure, didn't quote the term "in one way or another," which we submit, Your Honors, is patently vague.

Judge Thomsen: That has been approved by the Supreme Court, has it not, specifically in Gerende,—

Mr. Rosen: That's right—

Judge Thomsen: —"in one way or another"?

Mr. Rosen: —but we contend that there is an indication in Baggett that the Supreme Court has thought better of the phrase "in one way or another" and that if faced with the case would delete it—not delete it; would strike such an oath or statute requiring such an oath as being unconstitutionally vague.

Judge Sobeloff: And yet the author of the Baggett decision insists that Gerende is still law.

Mr. Rosen: He didn't insist, Your Honor. He distinguishes Baggett, and he said, we didn't do in Gerende what we are now doing in Baggett, and I think the indications are that if faced with the statute again, or the oath, which has to be read in the light of its statutory gloss as interpreted by the highest Court of the State, they wouldn't uphold it. It's the same statute that the Court faced in Baggett.

[fol. 85] It is the same statute that the Court faced in Baggett, and despite the fact that the oath in Baggett did actually put these provisions on the back, that is the definitional provisions on the back of the certification provided, we do not think that is required here.

The authority for giving the oath will be read by reasonable people, people who take oaths very seriously and consider seriously the fact that they are letting themselves open to prosecutions for perjury. The Court made very clear its concern with this opening of oneself for prosecution for perjury in the Baggett decision. In several cases it discusses the possibility of this problem, the fact that

prosecutors are likely to be reasonable is not sufficient to save a vague statute which provides for such prosecution.

But basically, Your Honors, we agree with the Attorney General and the University that the fundamental issue in this case is, what does Gerende mean? Does it still stand? And it is our fundamental position that in the light of the Supreme Court decisions in Elfbrandt and in Baggett, that Gerende can no longer be seen to stand; that at the very least, the Court has indicated its displeasure with two of the aspects of the oath, on vagueness grounds, vagueness and broadness grounds, that it seemed to find acceptable in the Gerende decision itself.

[fol. 86] Actually, Your Honors, I think that question has revealed the underlying position, as also reflected in the memorandum of the plaintiff, in regard to the significance of the Elfbrandt and statute cases and their effect upon Gerende.

If Your Honors have no further questions on the actual effect, of the actual vitality of Gerende, shall I proceed to the other points that we raise?

Judge Sobeloff: Yes.

Mr. Rosen: Our other points that we would have you pass upon, they are the subsidiary points in the case.

Judge Sobeloff: Go on.

Mr. Rosen: If I may diverge there for just one moment, may I suggest that on the point of our position that the Attorney General cannot by himself revise this oath after the Court of Appeals of Maryland placed its gloss upon it, which gloss has been interpreted by the Supreme Court of the United States; and I refer the Court to the concurring opinion of Mr. Justice Frankfurter in the Garner case, which is reported in 341 U.S. 716 at page 727. Justice Frankfurter says:

"The Attorney General did not give this assurance"—that is in Gerende—"as a matter of personal relaxation of a legal requirement. He was able to give it on the basis [fol. 87] of the interpretation that the Court of Appeals

of Maryland, the highest Court of that State, had placed upon the legislation."

As to the remaining points that plaintiff raises in his complaint and his supporting memorandum, first I would like to say that it is true that we have decided not to press the point of the plaintiff's particular religious beliefs. However, in our basic argument on the First Amendment rights and general rights, freedom of association and speech, conscience and the like, we do make the point that oaths of this sort when required to cross the board conditioned upon public employment are unconstitutional under the First Amendment.

In respect to the argument on bill of attainder, our position again is basically reflected in the legal memorandum in support of the complaint.

It is our position fundamentally that loyalty oaths as conditions of public employment, particularly loyalty oaths that go far in invading First Amendment areas are bills of attainder in the light of the Supreme Court's Brown decision. We think that Keyishan, which is before the Supreme Court, is now distinguishable primarily on the ground that in that case there is no loyalty oath any longer required and admission even of membership in a "sub-
[fol. 88] versive organization", is merely prima facie evidence of disqualification, and subject evidently to rebuttal, the same point, the same aspect of the case as most of the other cases that the Supreme Court decided in the last decade pertains to our point that by providing that the oath is an absolute condition for public employment, so that the failure to execute the oath makes one ineligible, violates due process by not providing for a hearing or by shifting the burden of proof on the plaintiff.

As to that, which raises the Speiser decision, quoted extensively by Mr. Murphy, may I suggest to the Court that Speiser still has vitality in the area of loyalty oaths.

Justice Douglas in his decision in Elfbrandt specifically stated that the result that was reached in Elfbrandt was

compelled a fortiori by Speiser. I believe that is on page 19 of 384 U.S.

Our basic position, if I may recapitulate, Your Honors, is that the oath now required must be read in the context with its statutory gloss, which by the way is provided by the highest Court of the State of Maryland, which is moderately confusing, and as so read has to fall as being unduly vague and broad; and that Gerende does not avoid this required decision because of the Supreme Court's recent determinations in Elfbrandt and in Baggett and Bullitt and in Cramp.

[fol. 89] Judge Winter: But does that get us anywhere if you do not prevail on the basic attack on Gerende because assume that we say as a matter of a reasonable man looking at this certification that we are bound to read the statute or that we should read the statute and will read the statute, and that reading the statute cannot legitimately sign a part of this oath because the statute is unconstitutionally vague and is broad?

In the light of the severability clause would not the most relief that you would be entitled to to have us enjoin the State of Maryland from requiring the aspects of the certification which are in violation of the Supreme Court decisions?

Mr. Rosen: No, I do not think so, Your Honor.

Judge Winter: Why should the whole statutory scheme fall if the part which the State presently asks for is valid?

Mr. Rosen: Because the statutory scheme is keyed into the definitional provisions which the Supreme Court in Gerende implied had received this gloss by the Court of Appeals of Maryland.

Now, in Dombrowski the Supreme Court held, and of course this involved a prosecution under a similar provision.

Judge Winter: Well, an injunction to restrain the prose-

[fol. 90] cution.

Mr. Rosen: In Dombrowski the Supreme Court held that the three-judge court should issue the injunction

against the statute, that is the enforcement of the law, subject to maintaining jurisdiction if necessary so that if the State Court at some future date clarified the Act in some way or another that the injunction issued by the three-judge court could then be modified.

But our position is that absent any such action by the State Court that this whole statute stands together through the definitional provisions which under Elfbrandt and Baggett are no longer any good.

Judge Winter: Except that it would be the duty of this Court as well as the duty of the State Courts to enforce the federal constitution if we found certain aspects of the oath as set forth in the statute, now not as demanded of this plaintiff, but as set forth in the statute to be invalid, wouldn't it be our obligation to call them invalid?

Mr. Rosen: The oath?

Judge Winter: Yes.

Mr. Rosen: Yes, sir.

Judge Winter: Well, why shouldn't we pick out the parts that are invalid and leave those which are valid?

Mr. Rosen: Because it is our position that they can't, our ultimate position is that they can't really be sepa-
[fol. 91] rated out in the area of a loyalty oath.

Judge Winter: You do not render the position of the Special Assistant Attorney General nugatory. He still would have some duties under the Act. True they may not be as broad as the Act originally contemplated; but where the legislature in one of the most elaborately phrased and carefully phrased severability clauses says "that even if a word or a phrase of this is unconstitutional and the balance can mean something, why, we want it separated."

Mr. Rosen: Well, the Court in the Heubech case, the case that we cited, bares some light on the Court of Appeals of Maryland view of the severability, and there they were faced again with a very well drafted severability clause and concluded that if a provision that was essential to the scheme fell and was closely interrelated with the

other provisions the whole Act would have to fall, and it is our basic position that the defmitional provisions, which we do reach as a result of Mr. Whitehill's stand to challenge the loyalty oath, are bad, and that this Court in the light of Dombrowski is not in a position to rewrite it for the State of Maryland, that this definitional provision has to fall, and until some subsequent action of the State of Maryland, the whole statute has to be enjoined.

Judge Winter: I see. Thank you.

Mr. Rosen: Thank you.

[fol. 92] Judge Sobeloff: Anything further from your side?

Mr. Weiner: No, sir.

Judge Sobeloff: All right, Mr. Murphy.

Mr. Murphy: Your Honor, we would point out that Exhibit A-1 in the complaint or the petition, which sets forth the certification of applicant for public employment, which he was asked to sign, and it does state "Required by law (Art. 85 A, Paragraph 13, Annotated Code of Maryland, 1957), at the University of Maryland, and it calls for that specific certification.

The University is an autonomous unit, and the certifications which are actually in use throughout the State, other than the University, do not contain that requirement. This pledge here is what is basically being used everywhere excepting Berkeley. I do not think it makes any differenee, but I would like to draw the Court's attention to the fact that—

Judge Sobeloff: All right.

Judge Winter: I am not quite sure I understand what you are saying.

Mr. Murphy: Well, perhaps I could show Your Honors ones that are actually in use.

[fol. 93] Judge Sobeloff: All right.

Judge Winter: Exhibit A-1 is entitled "Certification of applicant for public employment."

Mr. Murphy: Yes, sir.

Judge Winter: Now, you say this is the one which the University of Maryland used.

Mr. Murphy: Apparently it is, yes. The only difference between that and the one that is in use, and that I have just showed you, is that it does not have "Required by Article 85 A, Section 13."

It is a trivial difference, but I thought I ought to point out to the Court that that it is basically the same as the one I showed you. The language is the same in both with the exception of that difference.

Judge Winter: Of course, the fact of the matter is, and I do not want to be technical about it, is that this subtitle of the University of Maryland form does not refer you to anything because it says, "Article 85 A, Paragraph 13, Annotated Code of Maryland."

It is not a paragraph; it is a section.

Mr. Murphy: I assure you we did not write that form.

Judge Winter: I hope you did not.

Mr. Murphy: The contention that the Attorney General has not revised or does not have the power to revise it [fol. 94] and we did not revise it this was done by the Court, and it is the construction that this Court is faced with, and the loyalty pledge is based on that construction, and requires only a disavowal of a particular and specific type of activity, which I believe everyone will agree is very inimical to the public interest.

Judge Sobeloff: All right.

Mr. Weiner: Your Honor, as Judge Winter points out, the oath in question here, or the card in question here which Mr. Whitehill was asked to sign, states on its face that it is required by a law, and then it miscites the law, or it cites some nonexistent section, and if I read Mr. Murphy's brief correctly the State is taking the point that Section 13 of the Act may not even be the proper section and perhaps this oath is really required by Section 11.

But doesn't all that really point out the basic vagueness of all of the basic materials in this area? And doesn't that really point out that even what Elfbrandt itself, even what Gerende itself had originally said is not really clear to everyone?

Judge Winter at the very beginning of Mr. Murphy's argument had asked about what were the oaths that were used by the states up until the time of the Elfbrandt decision.

I think Judge Sobeloff mentioned that, "Well, maybe [fol. 95] perhaps that is really not relevant."

But to the extent that it is relevant, and in answer to Judge Winter's inquiry we have a complete set of the various oaths, or not a complete set, but a set of the various oaths that were used throughout the states after Gerende, some showing that they are 1963 forms, and some a little earlier, which cover the entire spectrum of loyalty oaths, some include the entire statutory definition. Some are more limited, and in some instances some are as limited as Gerende itself had said.

Judge Winter: Well, they were prepared by a whole battery of lawyers.

Mr. Weiner: A whole battery of lawyers, yes, sir.

Judge Winter: By counsel for the County Commissioners, the City Solicitor of Baltimore, the Special Assistant to the Attorney General, the Special Assistant to the University of Maryland, et cetera.

Mr. Weiner: All of whom we might presume are reasonable men; and yet every one of these people, responsible public officials, were reading Gerende differently.

The three-judge court in Baggett and Bullitt, before it came to the Supreme Court cited Shub and construed the Washington section there in the very same manner as the [fol. 96] Maryland Court of Appeals had construed the Maryland statute, which as Mr. Murphy concedes is the identical section.

So that really in that case the lower court, or the court just before the Supreme Court, had tried to do the same thing through the statute that the Maryland Court of Appeals had tried to do to the same statute here.

And yet when it came up to the Supreme Court, the Supreme Court read it and says, "We can't really understand what it means; it is vague."

It was a dissenter, it would appear from the opinion, who first pointed to Gerende and who lamented that Gerende was dead; and footnote 7 of Baggett and Bullitt would seem to be a reply to the dissent, and isn't it really a language problem where the Court had to omit the language of "in one way or another," when the Court began its "of what the Gerende oath was in the Baggett and Bullitt footnote they very carefully began the footnote by leaving out 'in one way or another.'"

Now, if "in one way or another" added anything or was of any significance is there any reason why it should have been left out?

And if Mr. Murphy is reasonable and can read "in one way or another," the way he does, what assurance is there that state prosecutors would read "in one way or another" [fol. 97] the identical way that Mr. Murphy does?

Certainly the state public officials who drafted these various oaths after Gerende read it differently than the Attorney General did. And do not the cases say in Cramp and those that followed that prosecutors too are human, and isn't that one of the dangers that vagueness, that the entire vagueness approach seems to be aimed at avoiding? Finally, if Gerende really retains all its vitality, why was it that the State right after or so soon after the decision in Elfbrandt chopped out a good part of it?

Judge Winter: Well, you heard them say because they are cautious lawyers.

Mr. Weiner: Well, I think they also said that they also see that mere knowing membership is clearly not something that the State can bar, t' at the State should bar.

I would respectfully submit to Your Honors that particularly in view of the "in one way or another", which has never been defined—

Judge Sobeloff: Not defined but adopted apparently by the Supreme Court in Gerende.

Mr. Weiner: Yes, yes, sir; but the Supreme Court in Gerende adopted a number of things which it does not

want to adopt any more and carefully deleted from Baggett and Bullitt.

[fol. 98] Judge Thomsen: Well, if they deleted it, isn't that an argument the other way? That they thought it was unimportant one way or the other. You do not accuse them of dishonesty in their footnote, do you?

Mr. Weiner: Oh, no.

Judge Thomsen: It evidently indicates that they did not think that those words were necessary to quote because it was attempting to state the facts.

Mr. Weiner: Doesn't it just as easily indicate that they are misleading?

Judge Thomsen: No.

Mr. Weiner: And in footnote 7 wasn't the Court trying to say, "We did not reach the statute?" At least that is the way—"We did not reach the Maryland statute in Gerende."

Judge Sobeloff: Why did not Mr. Justice Douglas make clear his position if he disagreed with that footnote?

Mr. Weiner: Why did not Justice Douglas?

Judge Sobeloff: Yes, in Elfbrandt.

Mr. Weiner: Of course, there are many reasons why a Justice will dissent or will not dissent; and the mere fact that they do not dissent or articulate their disagreement does not necessarily mean that they are in complete agreement with everything in that respect. I certainly hope [fol. 99] he does not, but that is our position, and I think Professor Rosen summarized it.

Judge Sobeloff: All right, gentlemen. Anything further?

Mr. Murphy: No, Your Honors.

Judge Sobeloff: The Court will adjourn. Thank you very much.

(Thereupon, at 11:10 o'clock a.m. the Court adjourned.)

Certified to be a true and correct transcript of the proceedings in the above case.

Rose M. Elgin, Official Reporter.

Francis T. Owens, Official Reporter.

[fol. 100]

July 11, 1966

Charles D. Murphy, Ph.D., Head
Department of English
College of Arts and Sciences
The University of Maryland
College Park, Maryland 20742

Dear Dr. Murphy:

I owe you an apology for passing so lightly over the loyalty oath question during our interview in your office. A lot of thought since that interview has persuaded me, however reluctantly, that this is not a matter to be taken lightly.

Everyone seems to agree that the loyalty oath law is a bad law. A bad law can be pulled down only if someone challenges it. But who will challenge it if to do so cuts off his livelihood and arrests his professional climb? Hardly anyone. Baby needs shoes.

These days it is very rare for an individual to find himself the pivot point in a major social matter, but it has just happened to me. Three radials have met at a point:

1. The University of Maryland, a State-supported institution, has firmly and unequivocally invited me to teach there.
2. I don't need the money.
3. As a Quaker, I am utterly opposed to oaths, whether or not they are disguised by weasel words like 'affirm' or 'certify,' that impute a common dishonesty which can only be lifted by writing your name.

Since circumstance has put me in a useful place, I must act usefully or regret it the rest of my life.

Therefore, I must decline to sign the "Certification of Applicant for Public Employment."

If you would like to hear them, there are several other [fol. 101] reasons I think are cogent for refusing to join in this charade.

Loyalty oaths belong less in the province of law than in that of pathology; they are a state's expression of its paranoia.

It is evident to all but the most childish minds that a serious, dedicated subversive would sign any such oath instantly, and take his chances with a perjury charge later.

A ridiculous law of a State reflects the light of ridicule over all the laws of the State.

In a free society (and in one like ours that is trying hard that way), it is the State's task to prove guilt, not the individual's to prove his innocence.

Now, coming to practical matters and the course of events:

Since I am by your letter evidently quite well qualified to teach, and am needed to teach, then if I am refused employment I can only consider such refusal a discrimination against me for my creed by the University and by the State. Upon notice in the form of a letter of refusal, or my non-receipt of my copy of the contract, I shall immediately begin suit against the University, the State, or both, in purpose to strike down this foolish law.

I think you and I will agree that this whole affair should neither color nor contaminate the workings of your Department. I'd like to keep the teaching and the legalistics in separate boxes. Therefore, if I am formally refused employment, and I have no pay or standing, it makes no difference to me; I'll still be there all day every Tuesday, doing the job that wants doing. In the unlikely event that I should lose my suit, I'll have had the privilege of working with you and the students, and you'll not have had an unexpected vacancy in the curriculum.

Reciprocal courtesy in this suggests quiet; other than my own file copy of this letter, there are two carbon copies. One goes today to the Reverend Irving R. Murray, Charles and Franklin Streets, Baltimore, Maryland 21201, telephone ID 5-4141. The Reverend Murray, as you doubtless [fol. 102] know, is head of the Maryland branch of the American Civil Liberties Union.

The other copy goes today to Dr. Carl Bode for his interest as the matters in it affect the American Association of University Professors.

Both these men are on caution to be silent until either the State or the University has moved. My immediate family have been apprised, but no one else. The press will receive no information until counsel so approves.

If I were given to levity in grave moments, which I am, I'd say, "Sorry about that, Chief!"

And I am.

But I'm not, really.

The best to you, as always,

JOSEPH WHITEHILL

[fol. 103]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

HOWARD JOSEPH WHITEHILL, JR., Plaintiff,

vs.

WILSON ELKINS, President, University of Maryland, BOARD OF REGENTS, University of Maryland, J. JEROME FRAMPTON, JR., President, State Board of Education, Defendants.

OPINION—Filed September 8, 1966

Before: Sobeloff and Winter, Circuit Judges, and Thomsen, Chief Judge.

Sanford Jay Rosen, Esq., Arnold M. Weiner, Esq., Mrs. Elsbeth Levy Bothe, and Joseph S. Kaufman, Esq., Attorneys for Plaintiff.

Thomas B. Finan, Esq., Attorney General of Maryland, Robert C. Murphy, Esq., Deputy Attorney General of Maryland, Loring E. Hawes, Esq., and Julius A. Romano, Esq., Assistant Attorneys General of Maryland, Attorneys for Defendants.

WINTER, Circuit Judge:

This action, brought under the Civil Rights Act, 42 U.S.C.A. § 1983, and invoking the civil rights and declaratory judgment jurisdiction of this Court, 28 U.S.C.A. §§ 1343(3), 2201 and 2202, seeks to enjoin the oath requirements of the Maryland Subversive Activities Act of 1949, 8A Annotated [fol. 104] Code of Maryland (1964 Ed.), Article 85A, §§ 1, *et seq.*, exacted of public employees as a condition precedent to public employment. Defendants' motion to dismiss admits the facts well pleaded, which are as follows:

Plaintiff is a member of the faculty of The Johns Hopkins University, teaching creative writing, an author, and a practicing member of the religious organization known as the Society of Friends. Plaintiff was engaged as a visiting lecturer in English at the University of Maryland, College Park, Maryland, for the academic year of 1966-1967. In July, 1966, a formal contract embodying the conditions of his employment was forwarded to plaintiff. He was also forwarded a document entitled "Certification of Applicant for Public Employment," which contained a loyalty oath.[1] Plaintiff was advised that he must sign it as a condition precedent to his employment. Plaintiff executed his employment contract, but declined to execute the loyalty oath. He was immediately advised by an authorized representative of the University of Maryland that that educational [fol. 105] institution would not accept his services without the loyalty oath first having been executed by him. Plaintiff declined to sign this oath and has now brought this suit, seeking a declaration that the oath sought to be exacted from him was unconstitutional and seeking to enjoin defendants from preventing the consummation of his contract with the University of Maryland because of his failure to execute the oath.[2] Pursuant to prayer in the complaint,

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[1] While this opinion uses the popular parlance "oath," technically plaintiff was required to make a written statement of his loyalty, under the penalties of perjury prescribed by 3 Annotated Code of Maryland (1957 Ed.), Art. 27, § 439. The document itself was entitled "Certification of Applicant for Public Employment" and the operative words were "I, _____ do hereby certify * * * ." Article 39 of the Maryland Declaration of Rights guarantees the right of any person to affirm, rather than swear, agreeably to his religious beliefs, and 1 Annotated Code of Maryland (1957 Ed.), Article 1, § 9 implements this guarantee.

[2] Included among the defendants is J. Jerome Frampton, Jr., president of the Maryland State Board of Education. This board has no power with regard to the University of Maryland, the government of which is vested in its Board of Regents. 7 Annotated Code of Maryland (1965 Ed.), Article 77 § 249(e). The motion to dismiss will be granted as to this defendant for improper joinder.

a statutory three-judge court was immediately convened, 28 U.S.C.A. §§ 2281 and 2284, and the case heard as promptly as possible, inasmuch as plaintiff's employment was to begin September 19, 1966.

The oath sought to be exacted from plaintiff is as follows:

> "CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)
>
> "I, ... do
> (Print Name—including middle initial),
> hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury [fol. 106] prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."
>
> Date .....
>
> Signature .....
> (Name—including middle initial)

In his complaint plaintiff alleges that the loyalty oath is unconstitutional, because it infringes on his First and Fourteenth Amendment rights, is so vague as to deny him due process, and equal protection of the laws, and constitutes a bill of attainder against him. Additionally, plaintiff obliquely alleged that the oath would deny him freedom of religion, but in argument plaintiff made no contention that any specific religious belief held by him was counter to the certification that he was asked to make.

Article 85A of the Annotated Code of Maryland was enacted in its entirety in 1949 and has never been amended. Of the provisions pertinent to this case, § 10 renders ineligible for employment by the state any person who is a

"subversive" person as defined in this Article. Section 13 required state employees who were such on June 1, 1949, the effective date of the Act, to make a written statement, subject to the penalties of perjury, that he or she was not a "subversive" person as defined in Article 85A, and § 11 requires every department, board, commission or other agency of the State of Maryland or any political subdivision thereof in the appointment of new employees, to establish procedures, by rules, regulations or otherwise, to ascertain that any employee "including teachers and other employees of any public educational institution in this state" is not a [fol. 107] "subversive" person as defined in the Article. The Attorney General of Maryland, in reliance upon these sections, has expressed the view that persons rendering occasional instructional services to the University of Maryland as part of the formal instruction program are required to execute the loyalty oath pledge. 45 Opinions Attorney General 187 (1960).

The operative words "subversive person" are defined by § 1, which reads:

> "'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of subversive organization or a foreign subversive organization."

Because one is a "subversive person" if he is a member of a "subversive organization" or a "foreign subversive organization," the definitions of those terms, as set forth in § 1 of Article 85A, should also be stated. They are:

"'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence.

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy [fol. 108] or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of, the United States, or of the State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means."

While plaintiff asserts a denial of his First and Fourteenth Amendment rights to freedom of speech and freedom of association as well as equal protection of the laws, the first substantive issue we must decide is whether the oath is so broad, vague and indefinite that plaintiff has been denied due process of law. This is so because plaintiff's First and Fourteenth Amendment rights are not violated if the oath is valid under the due process clause; they have been violated only if the oath will not withstand the due

process test. *Baggett* v. *Bullitt*, 377 U. S. 360 (1960); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966).[3] Of course, the pres- [fol. 109] ence of First and Fourteenth Amendment rights buttresses the strictness of the due process requirement. We turn first to whether the oath is so broad, vague and indefinite as to deny due process of law.

The validity of Article 85A under state and federal law was sustained in the state courts in *Shub* v. *Simpson*, 197 Md. 282, 76 A.2d 332 (1950); *Hammond* v. *Lancaster*, 194 Md. 462, 71 A.2d 474 (1950); and *Hammond* v. *Frankfeld*, 194 Md. 487, 71 A.2d 482 (1950). One of the parties in the *Shub* case sought further review in the Supreme Court of the United States, *Gerende* v. *Bd. of Supervisors of Elections*, 341 U. S. 56 (1951). Technically, the oath found to be valid in the *Gerende* case was the oath required of candidates for election by § 15 of Article 85A, while the oath to which plaintiff objects is the oath required by §§ 11 and 13 of Article 85A of state employees and appointed officers,

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[3] In the *Elfbrandt* case, the Arizona loyalty oath was held invalid because of its indefiniteness, i.e., its failure to require specific intent to subscribe to the unlawful ends of a subversive organization by one who has become a member thereof. The relationship between First and Fourteenth Amendment rights, on the one hand, and the due process requirement of definiteness, on the other, is demonstrated by the following extracts from the Court's opinion:

> "This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the states through the Fourteenth Amendment. (* * * citing).
>
> * * * *
>
> "'A statute touching those protected rights must be narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state.' Cantwell v. Connecticut, 310 U. S. 296, 311 * * *. Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' * * *
>
> "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. * * *". *Id.* at pp. 18-19.

[fol. 110] but, since the oaths are identical in both situations, what the Supreme Court said in the *Gerende* case is determinative here. The Court affirmed the decision of the Maryland Court of Appeals in *Shub* v. *Simpson, supra*, saying;

> "We read this decision to hold that to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt. —— Md. ——, at ——, 76 A.2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is affirmed." *Id.* at 56-57.

Thus, the Supreme Court in *Gerende* specifically approved of an oath that one is "not a person who is engaged in one way or another in the attempt to overthrow the government by force or violence," and that "he is not knowingly a member of an organization engaged in such an attempt." The oath in the case at bar is precisely in the form upheld by the Supreme Court, except that it eliminates the part of the oath that he who makes it also certifies that he is "not knowingly a member of an organization engaged in such an attempt [overthrow of the government by force or violence]." In argument we were told that the latter certification was eliminated from the form of oath at the instance of the Attorney General on May 3, 1966, following the decision in *Elfbrandt* v. *Russell, supra* [decided April 18, 1966]. In the light of this flat holding in *Gerende,* we need only determine whether *Gerende* has been subsequently over-[fol. 111] ruled or modified to decide plaintiff's first conten-

tion. Plaintiff asserts that *Gerende's* authority has been impaired by *Baggett* v. *Bullitt* and *Elfbrandt* v. *Russell, supra.*

In *Baggett* v. *Bullitt, supra,* loyalty oaths of the State of Washington, one applicable to teachers and the other applicable to all state employees, including teachers, were held invalid for vagueness. The oath required of all state employees, including teachers, is the significant oath for the case at bar. It required employees to swear that they were not a "subversive person" which was defined in terms identical to those under Article 85A § 1 to include one who "advocates, abets, advises or teaches by any means" another to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration of the constitutional form of government by revolution, force or violence. Insofar as a "subversive person" was one who was a member of a "subversive organization," the Washington definition included a limitation, absent in the Maryland definition, that membership be knowing. The Supreme Court held the "advocates, abets, etc." language invalid because it was lacking in terms susceptible of objective measurement and failed to inform what the state commanded or forbade.[4]

[fol. 112] The *Baggett* case is clear authority that if Maryland required an oath in the precise language of the Maryland Subversive Activities Act of 1949, *supra,* such an oath would be invalid. The fact is, however, that the oath sought to be exacted from the plaintiff in the case

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[4] *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961), was relied on to support this result. There Florida required state employees, including teachers, to make oath that they, *inter alia,* had not lent "aid, support, advice, counsel or influence to the Communist Party." 368 U. S. at p. 279. The oath was held invalid because lacking in terms susceptible of objective measurement. In so deciding, the Court commented on the absence of language proscribing "advocacy of violent overthrow of state or federal government" and "membership or affiliation with the Communist Party, past or present." 368 U. S. at p. 286.

at bar is less than that condemned in *Baggett* and, indeed, less than that approved in *Gerende*. While the dissenters in *Baggett* v. *Bullitt* expressed the view that *Gerende* had been overruled by the decision in *Baggett*, explaining the reasons for this conclusion in a footnote,[5] the majority answered by footnote that *Gerende* was still good law.[6] In view of the statement by the majority we cannot [fol. 113] read *Baggett* v. *Bullitt* as adversely affecting the portion of the holding in *Gerende* which approved the oath sought to be required of the plaintiff.

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[5] "It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in Gerende, but a review of the record in that case conclusively demonstrates to the contrary. Further, while the Gerende opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague." *Id.* at p. 382.

[6] "The contention that the Court found no constitutional difficulties with identical definitions of subversive person and subversive organizations in Gerende v. Board of Supervisors, 341 US 56, 95 L ed 745, 71 S Ct 565, is without merit. It was forcefully argued in Gerende that candidates for state office in Maryland were required to take an oath incorporating a section of the Maryland statutes defining subversive person and organization in the identical terms challenged herein. But the Court rejected this interpretation of Maryland law and did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes. Instead it made very clear that the judgment below was affirmed solely on the basis that the actual oath to be imposed under Maryland law requires one to swear that he is not a person who is engaged 'in the attempt to overthrow the government *by force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt.' Id., at 56-57, 95 L ed at 746 (emphasis in original). The Court said: "At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is Affirmed. Id. at 57, 95 L ed at 746." *Id.* at p. 368.

In *Elfbrandt* v. *Russell, supra,* the Arizona loyalty oath was held invalid. The language of the oath[7] as such did not appear to violate any constitutional fiat, but the legis- [fol. 114] lature put a gloss on the oath by subjecting to a prosecution for perjury and for discharge from public office anyone who took the oath and who "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations," or "any other organization," having for one of its purposes the overthrow of the government of Arizona by force or violence, where the employee had knowledge of the unlawful purpose. The failure of the statutory gloss to require further that the prosecution and expulsion be conditioned upon a showing that the employee was an active member *with the specific intent of assisting in achieving the unlawful ends of an organization which had as one of its purposes the violent overthrow of the government* rendered the gloss invalid.

The decision is, of course, ample justification for the Attorney General of Maryland to have eliminated the portion of the Maryland oath approved in *Gerende* that a person is not knowingly a member of a subversive organization, and to that extent overruled the decision in *Gerende.* The majority opinion makes no mention of *Gerende,* but we cannot read *Elfbrandt* as overruling *Gerende* to any greater extent, notwithstanding the inability of the dissenters to square the holding with the holding in *Gerende* and other cases. In short, in both of the decisions rendered after *Gerende* which have been pressed on us by plaintiff, we cannot find that the portion of the holding in *Gerende* which permits an oath that a person is not en-

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[7] "I, (type or print name), do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so held me God (or so I do affirm)."

gaged in one way or another in the attempt to overthrow the government by force or violence has been impaired. [fol. 115] Plaintiff argues that "in one way or another" is a phrase unconstitutionally vague, while defendants argue that "in one way or another" means "any way" and is linked to the word "attempt," so as to express the concept of specific intent, coupled with an overt act, to overthrow the government by force or violence. We need not choose between these arguments. It suffices to say that the phrase "in one way or another" was specifically approved in *Gerende;* we cannot find that it has been overruled; and it is our duty to apply the rules laid down by the Supreme Court and not to anticipate its possible future decisions.

Plaintiff also argues that the oath sought to be exacted from him is not limited to the text stated in the opinion but, rather, extends to the full oath purportedly required by Article 85A. Alternatively, plaintiff argues that the Attorney General of Maryland is without authority to require only a portion of the oath required by Article 85A, but not all. The first portion of the argument rests upon the assertion that, in the certificate plaintiff was asked to execute, the reference to "Art. 85A, paragraph 13, Annotated Code of Maryland 1957" after the phrase "Required by law" means that the certification following, which, on its face, is limited to engaging in one way or another in the attempt to overthrow the government by force or violence, embodies aspects of the oath prescribed by statute which are clearly invalid under the Supreme Court decisions. We are not persuaded. The other portion of the argument rests in part on *Dombrowski* v. [fol. 116] *Pfister,* 380 U. S. 479 (1965), which is cited as indicating that only a state court of the State of Maryland may properly determine whether the full oath prescribed by Article 85A can be severed into its valid and invalid provisions, and that it is our duty to enjoin the oath in its entirety until a state court renders an appropriate

judgment. This argument overlooks § 18 of Article 85A,[8] as clear an expression of severability as could be found. Moreover, as the chief legal officer of the State of Maryland, sworn to uphold the Constitution of the United States, as well as the Constitution and laws of the State of Maryland, Md. Constitution, Article 1, § 6, the Attorney General acted properly within the scope of his authority in advising that those portions of the oath prescribed by Article 85A repugnant to decided cases of the Supreme Court of the United States should not be required of state employees, even in the absence of a specific court decree. We do not read the *Dombrowski* case as proscribing this conduct.

We consider next plaintiff's argument that the oath is a bill of attainder and conclude that this contention is without merit. Loyalty oaths, as conditions precedent for [fol. 117] public employment, if otherwise valid, are not invalid as bills of attainder. *Garner* v. *Board of Public Works*, 341 U. S. 716, 722 (1951), held an oath of non-advocacy of violent overthrow of government required of municipal employees not punishment and hence not a bill of attainder. Even *Baggett* v. *Bullitt, supra,* which condemned a loyalty oath as unconstitutionally vague, recognized the right to a state " * * * to take proper measures safeguarding the public service from disloyal conduct" (p. 379). See also, *American Communications Ass'n* v. *Douds*, 339 U. S. 382 (1950); *Adler* v. *Board of Education*, 342 U. S. 485 (1952); and *Keyishian* v. *Board of Regents*, —— F. S. —— (W.D. N.Y. 1966), prob. jur. noted, 384 U. S. 998 (1966). *Speicer* v. *Randall*, 357 U. S. 513 (1958),

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[8] "18. Severability.

"If any provision, phrase, or clause of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions, phrases or clauses or applications of this article which can be given effect without the invalid provision, phrase, or clause or application, and to this end the provisions, phrases and clauses of this article are declared to be severable."

is not to the contrary as the discussion of that case in *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 53-56 (1961), demonstrates.

Under existing law, we do not find the oath tendered to plaintiff invalid. We conclude that the complaint should be dismissed. The Clerk will enter an order to that effect.

(See separate concurrence), United States Circuit Judge;

Harrison L. Winter, United States Circuit Judge;

Roszel C. Thomsen, Chief Judge, United States District Court for the District of Maryland.

[fol. 118] SOBELOFF, Circuit Judge, concurring:

In joining my brethren in the disposition of this case I wish to add a brief statement of my reasons.

Whether the ritual of an oath or affirmation of loyalty, with or without sanctions for perjury, is a wise or effective means to the unquestionably legitimate end of protecting the state against subversion is not the issue before us. The question is the legality of the particular requirement demanded of the plaintiff, not its desirability.

I am inclined to agree with the plaintiff that the prescribed oath or statement is not to be judged in isolation, but in conjunction with the statute, for in the absence of a statute, there would be no authority for demanding any statement "under penalty of perjury." If it were not for *Gerende* v. *Board of Supervisors*, 341 U.S. 56 (1951), I would not lightly dismiss the plaintiff's argument that the reference to Article 85A, with its language about "subversive persons" and "subversive organizations," has a material bearing on the question before us, even though the oath itself does not expressly embody these terms. But the question comes to us freighted with a history, and the role of the statute in respect to the oath has been authoritatively interpreted.

In *Gerende* the Court upheld an oath which was in terms more comprehensive than the one before us. The Court embraced what it regarded as a restrictive interpretation of the Ober Law by the Maryland Court of Appeals, and [fol. 119] upon that premise, and upon the condition that the Attorney General would advise the state authorities to accept as sufficient an affidavit in the narrow terms stipulated by the court, sustained the statute and the affidavit pursuant thereto. Whatever we might otherwise have thought, the Supreme Court has authoritatively decided that the broader language of the statute, which concededly would make it invalid, see *Baggett* v. *Bullitt,* 377 U.S. 360 (1964), is not controlling, but the less comprehensive language of the oath, as directed by the Attorney General, governs.

The plaintiff maintains first that the Supreme Court was mistaken in its analysis of the decision of the Maryland Court of Appeals in *Shub* v. *Simpson,* 196 Md. 177, 76 A.2d 332 (1950), and he further points to the logic employed in the later holdings in *Baggett* v. *Bullitt, supra,* and *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966), in support of his thesis that the Court must sooner or later disavow *Gerende.*

I acknowledge the force of the plaintiff's arguments as to the doubts concerning the present status of *Gerende* created by the recent decisions of the Supreme Court.[1] It [fol. 120] may well be that on renewed consideration the Supreme Court would today hold the statute and the oath, even as recently further modified by the Attorney General, too vague to meet constitutional standards. However, it is one thing for a lower court to project an estimate

[1] Keyishian v. Board of Regents, —— F. Supp. —— (W.D. N.Y. Jan. 5, 1966), prob. juris. noted, 384 U.S. 998 (1966), decided prior to the Supreme Court's decision in *Elfbrandt,* may be distinguishable from the case at bar. There is no New York equivalent to the "loyalty pledge" subject to penalties for perjury, that is before us today. Furthermore, as the three-judge district court emphasized, New York State, in requiring of a prospective employee the assurance that he has complied with the laws under attack in *Keyishian,* affords the applicant an opportunity to be heard, should he be in doubt as to the coverage of the statutes.

of the future course of Supreme Court decisions on a point not theretofore specifically ruled upon; it is quite another to assume that an earlier decision of the Supreme Court on the very question now pending before the inferior tribunal has been overruled *sub silentio*. Judicial discipline requires that such assumptions be not too freely made, especially when the Supreme Court seems to have been careful to avoid an outright overruling. If *Gerende* is ripe for final dispatch, the task is for the Supreme Court, not a subordinate court.

Thus, despite the doubts engendered by the course of subsequent adjudications, I think the contentions made by the plaintiff here are more properly addressed to the Supreme Court. I am obliged, therefore, to join in today's order of dismissal rather than anticipate the abandonment of *Gerende*.

SIMON E. SOBELOFF
U. S. Circuit Judge

[fol. 121]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Civil Action No. 17564

HOWARD JOSEPH WHITEHILL, JR., Plaintiff,

vs.

WILSON ELKINS, President, University of Maryland, BOARD OF REGENTS, University of Maryland, J. JEROME FRAMPTON, JR., President, State Board of Education, Defendants.

ORDER—Filed September 8, 1966

Defendants' motion to dismiss having come on for hearing, briefs having been filed, argument having been heard,

and the matter considered, it is, this eighth day of September, 1966, by the *United States District Court for the District of Maryland,*

Ordered that defendants' motion to dismiss be, and it is hereby, granted, and said complaint is dismissed, with costs to defendants.

Simon E. Sobeloff, United States Circuit Judge;
Harrison L. Winter, United States Circuit Judge;
Roszel C. Thomsen, Chief Judge,
United States District Court for the District of Maryland.

[fol. 122]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Civil Action No. 17564

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 13, 1966

I. Notice is hereby given that Howard Joseph Whitehill, Jr., the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint, entered in this action on September 8, 1966.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The Complaint for Preliminary and Permanent Injunction and Declaratory Judgment, filed on August 19, 1966 in this cause.

2. The Application for Convening of a three-Judge Court, filed on August 19, 1966.

[fol. 123] 3. The Motion for Preliminary Injunction, filed on August 19, 1966.

4. The Amendment to the Complaint, filed on August 26, 1966.

5. The Motion to Dismiss, filed on August 31, 1966.

6. The opinion and order of the Court, dated September 8, 1966, dismissing the complaint.

7. The docket sheet in this cause.

8. The transcript of the hearing of September 1, 1966.

9. The letter of July 11, 1966 from Plaintiff, Howard Joseph Whitehill, to Dr. Charles D. Murphy, Ph.D. Head, Department of English, the University of Maryland at College Park, Maryland, introduced at the hearing of September 1, 1966.

10. This notice of Appeal.

III. The following questions are presented by this appeal.

1. Are the "Certification of Applicant for Public Employment" which Plaintiff refused to execute, and the Maryland Subversive Activities Act of 1949, Article 85A, Maryland Code Ann. (1957), which requires its execution as a condition precedent to public employment, unconstitutionally vague, broad and indefinite in violation of due process of law?

2. If the definitional and certification provisions of Article 85A are unconstitutionally vague, broad and indefinite, does the entire statute fall notwithstanding the inclusion in it of a standard severability clause?

3. In the light of recent decisions of the Supreme Court, was the District Court correct in ruling that the certification and statute were insulated from constitutional attack by the Supreme Court's decision in *Gerende* v. *Board of Supervisors of Elections*, 341 U.S. 56 (1951)?

4. Do the "Certification of Applicant for Public Employment" and the statute pursuant to which it is required constitute a bill of attainder in violation in Article I, § 10 of the United States Constitution?

5. Do the Maryland Subversive Activities Act of 1949 and the "Certification of Applicant for Public Employment", required pursuant to it, infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or [fol. 124] subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law?

6. Does Maryland's loyalty "Certification", which is indiscriminately required of all public employees and applicants for public employment, particularly of teachers, unconstitutionally infringe the freedoms of expression, belief, association and academic freedom in violation of the First and Fourteenth Amendments to the United States Constitution?

Sanford Jay Rosen, 500 West Baltimore Street, Baltimore, Maryland 21201, Phone: 955-7145;

Arnold M. Weiner, 1215 Maryland National Bank Building, Baltimore, Maryland 21202, Phone: 727-2800;

Elsbeth Levy Bothe, 41 West Preston Street, Baltimore, Maryland 21201, Phone: 727-4425;

Joseph S. Kaufman, 1215 Maryland National Bank Building, Baltimore, Maryland 21202, Phone: 727-2800;

Lee M. Miller, 1100 One Charles Center, Baltimore, Maryland 21201, Phone: 752-6100,

Attorneys for Plaintiff-Appellant, Howard Joseph Whitehill, Jr.

[fol. 125] Proof of Service (omitted in printing).

[fol. 126] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 127]

SUPREME COURT OF THE UNITED STATES

No. 754—October Term, 1966

HOWARD JOSEPH WHITEHILL, Appellant,

v.

WILSON ELKINS, President, University of Maryland, et al.

Appeal from the United States District Court for the District of Maryland.

ORDER NOTING PROBABLE JURISDICTION—February 13, 1967

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~754~~ 25-1967

HOWARD JOSEPH WHITEHILL,

Appellant,

—v.

WILSON ELKINS, President, University of Maryland, and the BOARD OF REGENTS, University of Maryland,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

SANFORD JAY ROSEN
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

ARNOLD M. WEINER
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202

ELSBETH LEVY BOTHE
41 West Preston Street
Baltimore, Maryland 21201

JOSEPH S. KAUFMAN
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202

Attorneys for Appellant

LEE M. MILLER
1100 One Charles Center
Baltimore, Maryland 21202
Of Counsel

INDEX

PAGE

Jurisdictional Statement 1

Opinions Below 2

Jurisdiction 2

Statutes, Certificates and Administrative Rules Involved 3

Questions Presented 3

Statement 5

The Questions Are Substantial 14

I. The "Certification of Applicant for Public Employment" and the Maryland Subversive Activities Act of 1949, which requires its execution as a condition precedent to public employment, are unconstitutionally vague, uncertain, and broad in violation of due process of law 14

A. Maryland's Subversive Activities Law and the "Certification of Applicant for Public Employment" now required as a condition precedent to public employment are not protected from constitutional attack by this Court's 1951 decision in *Gerende* v. *Board of Supervisors of Elections* 14

B. Under long standing constitutional principle and recent decisions of this Court declar-

PAGE

ing unconstitutionally vague, uncertain and broad statutes of other states that were virtually identical to the Maryland Subversive Activities Act, particularly with respect to definitions, Maryland's statute is unconstitutionally vague, uncertain and broad on its face and as judicially construed and the "Certification of Applicant for Public Employment" is therefore an invalid condition on public employment 23

C. The definitional and oath provisions of Article 85A being unconstitutionally vague, uncertain and broad, the entire statute must fall notwithstanding the inclusion in it of a standard severability clause 29

II. Loyalty oaths, including Maryland's, that are indiscriminately required of all public employees and applicants for public employment, particularly teachers, are unconstitutional infringements on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution 31

III. The Maryland Subversive Activities Act of 1949 and the "Certification of Applicant for Public Employment", required pursuant to it, infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or

PAGE

subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law 39

IV. The required "Certification of Applicant for Public Employment" and the statute pursuant to which it is given constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution 44

CONCLUSION 46

APPENDICES 1a

Opinion of Two Judges of District Court (Winter and Thomsen) 1a

Special Concurring Opinion of One Judge of District Court (Sobeloff) 15a

Decision and Order 19a

Art. 85A, Md. Code Annot. (1957) 20a

"Certification of Applicant for Public Employment" 33a

Press Release by the Attorney General of Maryland, May 3, 1966 ..... 34a

TABLE OF AUTHORITIES

Cases:

Adler v. Board of Education, 342 U. S. 485 ....31, 33, 34, 35

American Communications Association v. Douds, 339 U. S. 382 ..... 18, 19

In re Anastoplo, 366 U. S. 82 ..... 32, 40

PAGE

Aptheker v. Secretary of State, 378 U. S. 550 .....passim
A Quantity of Books v. Kansas, 378 U. S. 205 40

Baggett v. Bullitt, 377 U. S. 360 .....passim
Bantam Books v. Sullivan, 372 U. S. 58 40
Barenblatt v. United States, 360 U. S. 109 35
Bates v. Little Rock, 361 U. S. 516 37
Beilan v. Board of Education, 357 U. S. 399 32
Brush v. State, Cir. Ct. Lane County, Oregon, Oct. 14, 1965 24

Connally v. General Construction Co., 269 U. S. 385 .. 23
Cramp v. Board of Public Instruction, 368 U. S. 278 .....3, 23, 24, 29, 33
Cummings v. Missouri, 71 U. S. (4 Wall.) 277 44

De Gregory v. Attorney General of New Hampshire, 383 U. S. 825 .....34, 37, 40
Dennis v. United States, 341 U. S. 494 16
Dombrowski v. Pfister, 380 U. S. 479 .....21, 24, 29
Dunne v. United States, 138 F. 2d 137 (8th Cir. 1943) 18

Elfbrandt v. Russell, 384 U. S. 11 .....passim
Elfbrandt v. Russell, 97 Ariz. 140, 397 P. 2d 944 (1965) 21

Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U. S. 73 3
Freedman v. Maryland, 380 U. S. 51 43

PAGE

Ex parte Garland, 71 U. S. (4 Wall.) 333 45
Garner v. Board of Public Works, 341 U. S. 716 ..... 28, 34, 35, 45
Georgia Conf. of AAUP v. Board of Regents, 246 F. Supp. 553 (N. D. Ga., 1965) 22, 23, 28
Gerende v. Board of Supervisors of Elections, 341 U. S. 56 ..... passim
Gerende v. Board of Supervisors of Elections, 197 Md. 282, 78 A. 2d 660 (1951) ..... passim
Gibson v. Florida Legislative Committee, 372 U. S. 539 ..... 24, 34, 37
Gojack v. United States, 384 U. S. 702 37
Griswold v. Connecticut, 381 U. S. 479 37

Hammond v. Frankfeld, 194 Md. 487, 71 A. 2d 482 (1950) 11
Hammond v. Lancaster, 194 Md. 462, 71 A. 2d 474 (1950) 11
Heckler v. Shepard, 243 F. Supp. 841 (E. D. Idaho) (1965) 33, 39, 40, 41
Huebech v. City of Baltimore, 205 Md. 203, 107 A. 2d 99 (1954) 29
Hurwitz v. Director's Guild of America, 364 F. 2d 67 (2d Cir. 1966) 24

Kennedy v. Mendoza-Martinez, 372 U. S. 144 41
Keyishian v. Board of Regents, 345 F. 2d 236 (2d Cir. 1965) 33
Keyishian v. Board of Regents, —— F. Supp. —— (W. D. N. Y. Jan. 5, 1966), *prob. juris. noted*, 384 U. S. 998 39

PAGE

Konigsberg v. State Bar of California, 366 U. S. 36 ..... 32, 40
Konigsberg v. State Bar of California, 353 U. S. 252 32

Lamont v. Postmaster General, 381 U. S. 301 ..... 33, 43, 44
Lanzetta v. New Jersey, 306 U. S. 451 23
Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N. W. 2d 605 (1955) 34, 37
Lerner v. Casey, 357 U. S. 468 32

Marcus v. Search Warrant, 367 U. S. 717 40-41

NAACP v. Button, 371 U. S. 415 29
Nelson v. Los Angeles County, 362 U. S. 1 ..... 32, 40
New York Times Co. v. Sullivan, 376 U. S. 254 34
Nostrand v. Little, 362 U. S. 474 40
Noto v. United States, 367 U. S. 290 ..... 19, 24, 25

Pennsylvania v. Nelson, 350 U. S. 497 9
Poe v. Ullman, 367 U. S. 497 38

Railroad Retirement Board v. Alton R.R., 295 U. S. 330 29

Scales v. United States, 367 U. S. 203 ..... 19, 24, 25
Schneider v. Rusk, 377 U. S. 163 ..... 33, 41
Shelton v. Tucker, 364 U. S. 479 ..... 3, 24, 31, 33, 38
Sherbert v. Verner, 374 U. S. 398 ..... 33-34, 40
Shub v. Simpson, 196 Md. 177, 76 A. 2d 332 (1950) ..... passim
Slochower v. Board of Education of New York, 350 U. S. 551 ..... 40, 41

PAGE

Smith v. California, 361 U. S. 147 ..... 23, 43
Speiser v. Randall, 357 U. S. 513 ..... 3, 34, 41, 42, 43, 44
Sweezy v. New Hampshire, 354 U. S. 234 ..... 3, 36, 37

Thornhill v. Alabama, 310 U. S. 88 29
Torcasso v. Watkins, 367 U. S. 88 ..... 33, 40, 41

United States v. Brown, 381 U. S. 437 ..... 19, 34, 45
United States v. Dennis, 183 F. 2d 201 (2d Cir. 1950) 18, 19, 25
United States v. Lovett, 328 U. S. 303 45

West Virginia State Board of Education v. Barnette, 319 U. S. 624 40
Wieman v. Updegraff, 344 U. S. 183 ..... 33, 36, 41
Winters v. New York, 333 U. S. 507 23

Yates v. United States, 354 U. S. 298 ..... 19, 25

Statutes:

Federal Constitutional Provisions:

Article I, Section 10, U. S. Const. 2, 5, 44
First Amendment, U. S. Const. 4, 31, 34, 36, 38, 40
Fourteenth Amendment, U. S. Const. 2, 4, 31

Federal Statutes:

18 U. S. C. § 2385 9
28 U. S. C. § 1253 3
28 U. S. C. § 1343 2

PAGE

28 U. S. C. § 2201 2

28 U. S. C. § 2202 2

28 U. S. C. § 2281 2

28 U. S. C. § 2284 2

The Landrum-Griffin Act, 29 U. S. C. §§ 401-531 45

42 U. S. C. § 1983 2

State Constitutional Provisions, Statutes, Administrative Rules and Certificates:

Art. 15, § 11, Maryland Constitution 5, 16, 17

Art. 37, Maryland Declaration of Rights 16

Chapter 721 of the Acts of Maryland of 1947 5

Senate Joint Resolution No. 2, 1948 Laws of Md. 158 (1948 extraordinary session) 6, 30

1949 Laws of Maryland 96-97 (Preamble to Art. 85A) 6, 30

Ch. 310 of the Maryland Acts of 1949 6

§ 3(c), Art. 10, Md. Code Annot. (1957) 27

Article 85A, Md. Code Annot. (1957) .....passim

§ 1, Art. 85A, Md. Code Annot. (1957) 2, 3, 5, 7, 10, 25, 30

§ 2, Art. 85A, Md. Code Annot. (1957) 8, 9

§ 3, Art. 85A, Md. Code Annot. (1957) 8, 25

	PAGE
§ 4, Art. 85A, Md. Code Annot. (1957)	8
§ 5, Art. 85A, Md. Code Annot. (1957)	8
§ 6, Art. 85A, Md. Code Annot. (1957)	9
§ 7, Art. 85A, Md. Code Annot. (1957)	9
§ 8, Art. 85A, Md. Code Annot. (1957)	9
§ 9, Art. 85A, Md. Code Annot. (1957)	9
§ 10, Art. 85A, Md. Code Annot. (1957)	2, 3, 5, 9, 25
§ 11, Art. 85A, Md. Code Annot. (1957)	2, 3, 5, 9, 10, 25, 28, 41
§ 12, Art. 85A, Md. Code Annot. (1957)	9
§ 13, Art. 85A, Md. Code Annot. (1957)	2, 3, 5, 9, 25, 41
§ 14, Art. 85A, Md. Code Annot. (1957)	10, 25
§ 15, Art. 85A, Md. Code Annot. (1957)	10, 14, 16, 25
§ 16, Art. 85A, Md. Code Annot. (1957)	10
§ 17, Art. 85A, Md. Code Annot. (1957)	2, 3, 5, 10, 22
§ 18, Art. 85A, Md. Code Annot. (1957)	2, 3, 5, 10, 29
§ 19, Art. 85A, Md. Code Annot. (1957)	10
§ 435, Art. 27, Md. Code Annot. (1957)	22
§ 439, Art. 27, Md. Code Annot. (1957)	22
"Certification of Applicant for Public Employment"	passim
News Release of the Attorney General of Maryland, May 3, 1966	3

PAGE

Rule Second, Rules Governing Registration of Law Students and Admission to the Bar of Maryland, 9A Md. Code Annot. p. 233 (1957) 27

Ariz. Rev. Stat. § 38-231, subs. G, as amended 1961, Ch. 108, § 5 21

Rev. Code Wash. Ann., Ch. 9.81 (1961) 19

Rev. Code Wash. Ann., Sec. 9.81.083 (1961) 19

Miscellaneous:

Amsterdam, *The Void for Vagueness Doctrine,* 109 U. Pa. L. Rev. 67 (1960) 23

Commager, *Is Freedom an Academic Question?,* Saturday Review, June 20, 1964, 54 35

Educational Freedom in an Age of Anxiety (Hullfish, ed., 1953) 36

Lazarsfeld and Thielens, The Academic Mind (1958) 36, 38

MacIver, Academic Freedom in Our Time (1955) 36

Morris, *Academic Freedom and Loyalty Oaths,* 28 Law and Contemporary Problems 487 (1963) 36

Morris, *Baggett v. Bullitt: Scienter & "Guiltless Knowing Behavior",* 1 Law in Transition Q. 185 (1964) 24

Murphy, *Academic Freedom—An Emerging Constitutional Right,* 28 Law and Contemporary Problems 447 (1963) 36, 41

PAGE

Prendergast, *Maryland: The Ober Anti-Communist Law* in THE STATES AND SUBVERSION 140 (Gellhorn ed. 1952) 6, 30, 38

REPORT OF THE COMMISSION ON SUBVERSIVE ACTIVITIES TO GOVERNOR WILLIAM PRESTON LANE, JR., AND THE MARYLAND GENERAL ASSEMBLY (January, 1949) 30

SUTHERLAND, STATUTORY CONSTRUCTION (3rd Ed. 1943) 29, 30

Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CALIF. L. REV. 212 (1966) 46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

HOWARD JOSEPH WHITEHILL,

Appellant,

—v.—

WILSON ELKINS, President, University of Maryland, and the BOARD OF REGENTS, University of Maryland,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the United States District Court for the District of Maryland entered on September 8, 1966, dismissing the Complaint filed below and holding that Article 85A of the Maryland Code Annotated (1957), the Subversive Activities Act of 1949, and the "Certification of Applicant for Public Employment" required by it as a condition precedent to public employment, and the interpretation of the Attorney General of Maryland of May 3, 1966 as to the scope of that requirement, are constitutional, and Appellant submits this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion and order of the United States District Court for the District of Maryland and the special concurrence of Judge Sobeloff were rendered on September 8, 1966, and are not yet officially reported. The opinions and the judgment and final order in this case are set out in the Appendix *infra*, at pp. 1a-19a.

Jurisdiction

This class action was instituted on August 19, 1966 under Section I of the Fourteenth Amendment of the Constitution of the United States, under Article I, Section 10, Paragraph 1 of the Constitution of the United States; and under Sections 1343, 2201 and 2202 of Title 28 and Section 1983 of Title 42 and Sections 2281 and 2284 of Title 28 of the United States Code. The court below was asked to pass on the constitutionality of Article 85A of the Md. Code Annot. (1957), the Subversive Activities Act of 1949, particularly Sections 1, 10, 11, 13, 17, 18, and the "Certification of Applicant for Public Employment" required pursuant to it according to the interpretation of the certification requirement most recently made by the Attorney General of Maryland. The relief prayed was an injunction against the Appellees, each of whom is either an official body or officer of the State of Maryland, from enforcing the statutes and rulings complained of, and, also "such other and further relief as to the Court may seem just and proper."

By decision filed on September 8, 1966, the District Court gave judgment for the Appellees and denied all relief re-

quested by the Appellant. Notice of appeal was filed in the District Court for the District of Maryland on September 13, 1966. Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Baggett* v. *Bullitt*, 377 U. S. 360; *Shelton* v. *Tucker*, 364 U. S. 479; *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73. And see, *Sweezy* v. *New Hampshire*, 354 U. S. 234; *Speiser* v. *Randall*, 357 U. S. 513; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278.

Statutes, Certificates and Administrative Rulings Involved

The provisions of the law involved in this case are: Article 85A, Md. Code Annot. (1957), the Maryland Subversive Activities Act of 1949, particularly Sections 1, 10, 11, 13, 17 and 18; the "Certification of Applicant for Public Employment" required of Appellant; and the May 3, 1966 ruling of the Attorney General of Maryland as to the scope of the certification requirement. Because of their length, the text of the statutory provisions, certificates, and rulings, involved are set out in the Appendix, *infra*, pp. 20a-34a.

Questions Presented

1. In the light of recent decisions of this Court, was the District Court correct in ruling that the "Certification of Applicant for Public Employment" which Appellant refused to execute, and the Maryland Subversive Activities

Act of 1949, which requires execution of that Certification as a condition precedent to public employment, are insulated from constitutional attack by this Court's decision in *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951)?

2. Are the certification and the statute under which it is compelled unconstitutionally vague, uncertain and broad in violation of due process of law?

3. If the definitional and certification provisions of the Maryland Subversive Activities Law of 1949 are unconstitutionally vague, broad and indefinite, does the entire statute fall notwithstanding the inclusion in it of a standard severability clause?

4. Does Maryland's loyalty "Certification", which is indiscriminately required of all public employees and applicants for public employment, particularly of teachers, unconstitutionally infringe the freedoms of expression, belief, association and academic freedom in violation of the First and Fourteenth Amendments to the United States Constitution?

5. Do the Maryland Subversive Activities Act of 1949 and the "Certification of Applicant for Public Employment" required pursuant to it, infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law?

6. Do the "Certification of Applicant for Public Employment" and the statute pursuant to which it is required constitute a bill of attainder in violation of Article 1, §10 of the United States Constitution?

Statement

This suit challenges the constitutionality of particularly Sections 1, 10, 11, 13, 17 and 18 of Article 85A, MD. CODE ANNOT. (1957), which are sections of the Maryland Subversive Activities Act of 1949, and the "Certification of Applicant for Public Employment" required pursuant to it and the ruling of the Attorney General of Maryland of May 3, 1966 which most recently interpreted the scope of this requirement.

By Chapter 721 of the Acts of 1947, the General Assembly of Maryland proposed an amendment to the Constitution of Maryland by adding a new Section 11 to Article 15 thereof, which reads as follows:

> "No person who is a member of an organization that advocates the overthrow of the government of the United States or of the State of Maryland through force or violence shall be eligible to hold any office, be it elective or appointive, or any other position of profit or trust in the government of or in the administration of the business of this State or any county, municipality, or other political sub-division of this state."

The proposed amendment was approved by a vote of the people of Maryland on November 2, 1948.

At a special session of the General Assembly of Maryland in 1948, Senate Joint Resolution No. 2 was passed, see 1948 LAWS OF MD. 158 (1948 extraordinary session), directing the Governor to appoint a committee on subversive activities to study the laws of the United States, and of the several states, and to formulate and prepare a legislative program for the protection of democratic principles of government and ideals and for the exposure and expurgation of subversive activities in the State of Maryland. Pursuant to this resolution, the Governor appointed a "Commission on Subversive Activities", with Frank B. Ober, Esquire, as chairman. The report of the commission, covering 115 pages, was submitted to the Governor on September 30, 1948, with an attached draft of a proposed bill entitled, "Sedition and Subversive Activities". The legislature enacted the substance and most of the detail of the bill proposed by the commission and it became Chapter 86 of the Acts of 1949, now codified as Article 85A of the ANNOTATED CODE OF MARYLAND (1957). By Chapter 310 of the Acts of 1949, Chapter 86 was declared an emergency measure, and took effect on the date of its passage, April 22, 1949. On the background of the law, see Prendergast, *Maryland: The Ober Anti-Communist Law,* in THE STATES AND SUBVERSION 140 (Gellhorn ed. 1952). This law is popularly known as the "Ober Law" after the chairman of the Commission.

In a preamble to the Act, see 1949 LAWS OF MARYLAND 96-97, the General Assembly declared its findings, *inter alia,* that there existed a world-communist movement, under the domination of a foreign power, "having as its objective the establishment of totalitarian dictatorship in all parts

of the world under its control"; that such dictatorship is "characterized by the liquidation of all political parties other than the Communist party, the abolishment of free speech, free assembly and freedom of religion, and is a complete antithesis of the American constitutional form of government"; that other subversive organizations have other similar objectives; that the methods of subversive persons and subversive organizations "include treachery, deceit, infiltration into goverment, and other institutions, espionage, sabotage, terrorism, and other unlawful means"; that "the methods adopted by subversive persons and organizations render it imperative that the loyalty of persons entering the public employment of the State of Maryland or any of its political sub-divisions be definitely established"; and that "the Communist movement plainly presents a clear and present danger to the United States Government and to the" government of the State of Maryland and their political subdivisions.

Although made up of nineteen sections, the Ober Act, Article 85A, is an integrated whole establishing a regulatory scheme to guard against "Sedition and Subversive Activities."

Section 1 of Article 85A sets forth the definitions which form the basis for the entire scheme. Defined therein are the terms "organization", "subversive organization",[1] "for-

[1] "'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence."

eign subversive organization",[2] "foreign government", and "subversive person."[3]

Section 2, not directly at issue in this case, but relevant to it, makes it a felony "knowingly and willfully" to engage in certain defined subversive activities. Section 3 makes it a felony knowingly to remain or become a member of a subversive organization. Section 4 disqualifies persons found guilty under Sections 2 or 3 from holding public office, standing for election, or voting in any election in Maryland. Section 5 declares unlawful and provides for the dissolution of "subversive organizations" and "foreign subversive organizations". At least so far as these provisions deal with subversion of the United States Government, it is clear that they have been superseded by the

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[2] "'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means."

[3] "'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force or violence; or who is a member of a subversive organization or a foreign subversive organization."

Smith Act, 18 U. S. C. §2385. *Pennsylvania* v. *Nelson*, 350 U. S. 497. See also, Commentator's note to Section 2 of Art. 85A, MD. CODE ANNOT. (1957).

Sections 6 through 9 deal with the appointment of an Assistant Attorney General to be "in charge of subversive activities", the collection of evidence and information with respect to subversion and appointment of additional personnel for the task; the keeping of relevant records and reports, particularly "such records as may reflect on the loyalty of any resident of this State"; and the use of Grand Juries for purposes of inquiring into violations of the Article.

Section 10 declares that "no subversive person, as defined in this article, shall be eligible for" public employment or appointment. Section 11 requires each governmental board, agency, or body which appoints, employs or supervises appointment or employment of public officials or employees to establish procedures for ascertaining that all such appointees or employees are not "subversive persons". "[T]eachers and other employees of any public educational institution in this State" are the only such appointees or employees given specific mention. In addition, the section provides that applicants "shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury". Section 12 makes the loyalty provisions inapplicable to laborers.

Section 13 required every state employee employed as of June 1, 1949, "to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article". This quoted statement is then followed by

the definition of "subversive person" given in Section 1. See *supra,* p. 8, note 3. The Section further provided that an employee who failed or refused "to execute such a statement or who admits he is a subversive person as defined in this article shall immediately be discharged". While earlier loyalty cards referred to Article 85A, without specification of a particular section, as their legislative authority, the "Certification of Applicant for Public Employment" demanded by the University officials in this case, set forth, *infra,* in the Appendix at p. 33a, states that it is required by this "Paragraph" 13. At the hearing below the Attorney General said that the loyalty certificates required by some other state agencies refer generally to Article 85A (Tr. 40-41). Authority for requiring the certification here at issue lies primarily under Section 11.

Section 14 provides that reasonable ground for believing a person is a "subversive person" is cause for discharge and it makes provision for administrative hearing and judicial review in such cases. Section 15 requires candidates for election to any public office to file affidavits that they are not "subversive persons". Section 16 requires private institutions of learning receiving public funds to report on the procedures and efforts that they undertake to remain free of employees who are "subversive persons". Section 17 renders misstatements by public employees and applicants for public employment or appointment subject to statutory penalties of perjury. Section 18 is a standard severability clause. Section 19 sets forth the short title of the Act.

Shortly after passage, a number of suits were brought challenging the Ober Law on constitutional grounds. It was authoritatively construed by the Court of Appeals of

Maryland and upheld against all constitutional attack. *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed,* 340 U. S. 881; *Gerende* v. *Board of Supervisors of Elections,* 197 Md. 282, 78 A. 2d 660 (1951), *aff'd per curiam,* 341 U. S. 56. See also *Hammond* v. *Lancaster,* 194 Md. 462, 71 A. 2d 474 (1950); *Hammond* v. *Frankfeld,* 194 Md. 487, 71 A. 2d 482 (1950). On appeal in the *Gerende* case, which involved the affidavit required of candidates for public office, this Court affirmed, relying upon its interpretation of the Court of Appeals of Maryland's construction of the Maryland statute in *Shub.*

Since in a motion to dismiss all facts well pleaded in the complaint are accepted, the facts in this case are as follows:

The Appellant herein, Howard Joseph Whitehill, Jr., is presently a resident of Chestertown, Maryland and is engaged in teaching creative writing at the Johns Hopkins University in Baltimore and in the writing of works of fiction and of non-fiction. He is, furthermore, a practicing member of the Religious Society of Friends, known also as Quakers. The Appellees are Wilson Elkins who is the President of the University of Maryland, and the Board of Regents of the University. They are fully and completely responsible for supervising, directing and otherwise controlling, so far as the University's personnel is concerned, the enforcement of the requirement under Article 85A that all applicants for employment with and all employees of the University execute as a condition precedent to employment some certification of loyalty and particularly the "Certification of Applicant for Public Employment" that was required of Appellant.

As a consequence of an understanding with representatives of the University of Maryland at College Park, Maryland, particularly Dr. Charles E. Murphy, head of the English Department of the University, the Appellant executed a written contract for his appointment as a visiting lecturer in English during the academic year of 1966 to 1967. Under the terms of the contract he was to be paid $7,000.00 on a ten month basis starting in September 1966; and he agreed to spend one day a week at the College Park campus each semester, teaching two creative writing classes in 75 minute sessions, and making additional conference time available for consultation with students.

By a letter dated July 6, 1966, and signed by Dr. Murphy, the Appellant received the contract and certain additional papers, including what was denominated a "Certification of Applicant for Public Employment", which contained a loyalty test and which he was instructed had to be signed as a condition precedent to his appointment. The Appellant executed the contract, and by letter of July 11, 1966, he mailed it to Dr. Murphy, declining in a separate letter enclosed therewith, however, to execute the "Certification of Applicant for Public Employment". In his letter of explanation the Appellant offered to serve without pay pending the adjudication of the issues in this case. Dr. Murphy by a letter of July 18, 1966, advised the Appellant that the University of Maryland would not accept his services without the required certification having been executed and filed by him.

On August 19, 1966, the Appellant filed suit in the United States District Court for the District of Maryland requesting a preliminary and permanent injunction, declaratory judgment, and "such other and further relief as to the

Court may seem just and proper". A statutory three-Judge District Court was convened, and a hearing was conducted on September 1, 1966 on the State's motion to dismiss the complaint for failure to state a cause of action upon which relief could be granted. The State's motion was filed on August 31, 1966. On September 8, 1966, the District Court issued its order and opinion dismissing the complaint and resolving each of the constitutional issues the Appellant raised against him, primarily on the ground that this Court's decision in *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56, was controlling on the issues in this case even though, strictly speaking, *Gerende* directly involved the candidates' oath requirement under Section 15, and not, as here, the employees' oath requirement under Sections 11 or 13. Judge Sobeloff, concurring specially wrote a separate opinion in which he indicated his doubts as to the continued vitality of the *Gerende* decision in the light of subsequent decisions of this Court and in ending said ". . . despite the doubts engendered by the course of subsequent adjudications, I think the contentions made by the plaintiff here are more properly addressed to the Supreme Court. I am obliged, therefore, to join in today's order of dismissal rather than anticipate the abandonment of *Gerende*" (App. 18a). Notice of Appeal was filed on September 13, 1966.

The Questions Are Substantial

I.

The "Certification of Applicant for Public Employment" and the Maryland Subversive Activities Act of 1949, which requires its execution as a condition precedent to public employment, are unconstitutionally vague, uncertain, and broad in violation of due process of law.

A. Maryland's Subversive Activities Law and the "Certification of Applicant for Public Employment" now required as a condition precedent to public employment are not protected from constitutional attack by this Court's 1951 decision in *Gerende* v. *Board of Supervisors of Elections.*

Judge Winter for the majority in the District Court below said, " . . . what the Supreme Court said in the *Gerende* case is determinative here." Appendix, *infra,* p. 8a. It is Appellant's contention, however, that decisions of this Court subsequent to *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56, have destroyed the underpinnings of that case and if this Court has not yet done so it should reconsider and overrule that decision.

In *Gerende* this Court upheld the requirement of Section 15 of Article 85A of the MD. CODE ANNOT. (1957), pursuant to which candidates for public office must submit affidavits of loyalty. This affirmance was based upon the Maryland Court of Appeals' earlier decision in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed,* 340 U. S. 881. Specifically this Court said:

> "We read that decision to hold that to obtain a place on the Maryland ballot a candidate need only make oath

that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence*', and that he is not knowingly a member of an organization engaged in such an attempt. —— Md. at ——, 76 A. 2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirements. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is *affirmed.*" *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56-57.

During the argument below in this case, Judge Winter made the following comment: "Of course, the Supreme Court of the United States said they read the Shub case as saying that only the shortened form of oath was required. I find it a little difficult to reach the same conclusion, reading the Shub case, just on my own. . . ." (Tr. 9). Appellant respectfully agrees that the *Shub* decision cannot properly be read to support the restrictive interpretation of the oath requirement that was urged upon this Court in *Gerende* by the Attorney General of Maryland. Alternatively, it is Appellant's position that the interpretation accepted by this Court in 1951 is much less limited than initially thought and, when judged by current standards, the statute and oath requirement as interpreted are unduly vague, uncertain and broad.

The Plaintiffs in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed,* 340 U. S. 881 and *Gerende* v. *Board of Supervisors of Elections,* 197 Md. 282, 78 A. 2d 660 (1951), *aff'd per curiam,* 341 U. S. 56, sought to run

for public office in Maryland without filing the affidavits of loyalty required by Section 15 of the Ober Law. In *Shub*, where the Maryland Court of Appeals rendered its only full opinion considering the Ober Law on its merits, the main ground for attack was that the Section required an oath of office additional to the one provided by the Maryland Constitution and was therefore invalid under Article 37 of the Maryland Declaration of Rights which prohibits the legislature from prescribing additional oaths of office. The Maryland Court of Appeals, however, viewed Section 15 of the Act as requiring not an oath but merely an affidavit of qualification for office implementing Article 15, Section 11 of the Maryland Constitution which reads: "No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any [public] office . . . " The plaintiffs in *Shub* contended that the affidavit required under Section 15 of the Act for candidates, identical to the oath prescribed in Section 13 for public employees, went far beyond Article 15, Section 11 of the Constitution, for it encompassed committing, attempting to commit, advocating, abetting, or advising alteration of the government by peaceful revolution and also membership in foreign organizations the purposes of which are to overthrow or alter the government by means not involving force or violence.

Upholding the legislation, the Maryland Court of Appeals, consistent with its interpretation of the test of "clear and present danger" already enunciated by the federal Courts of Appeals, see 196 Md. at 195, 76 A. 2d at 340, and about to be adopted by this Court in *Dennis* v. *United States*, 341 U. S. 494, ruled that:

> *"A person who advocates the overthrow of the Government of the United States, or of this State, through force or violence* could scarcely in good faith, take the constitutional oath of office prescribed by Article 1, Sec. 6, and the Legislature has taken pains to see that the name of any such unqualified person shall not appear on the ballot." 196 Md. at 190, 76 A. 2d at 337 (Emphasis supplied).

Specifically the court held that the purpose of Article 85A, the Ober Law, was identical with and therefore not inconsistent with that of Section 11 of Article 15 of the Maryland Constitution, which purpose the court said was "to prevent infiltration in our state, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence.*" *Shub v. Simpson,* 196 Md. 177, 192, 76 A. 2d 332, 338 (1950) (Emphasis in original).

Having reconciled the Ober Law to the Maryland Constitution, the Maryland Court of Appeals also addressed the federal Constitutional questions.

> "These grounds [said the Court] are that it [Article 85A] abridges the fundamental rights of freedom of speech, press and assembly, that it is vague and indefinite and therefore violates due process, that it is a bill of attainder, that it attempts to establish guilt by association, and other similar contentions. It is contended that the act is basically inseparable in its provisions, and, therefore, it should be stricken down in its entirety." 196 Md. at 195, 76 A. 2d at 339.

Responding to these arguments, the court said that "[t]he purpose of Chapter 86 [Article 85A], as shown by its title

and throughout its provisions, is not to restrict freedom of speech or thought, nor does it do so." 196 Md. at 192, 76 A. 2d at 338. And relying upon the federal Court of Appeals' decisions in *Dunne* v. *United States,* 138 F. 2d 137 (8th Cir. 1943), *cert. denied,* 320 U. S. 790; *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), *aff'd,* 341 U. S. 494; and this Court's decision in *American Communications Association* v. *Douds,* 339 U. S. 382, the Maryland court concluded that:

> "We do not think it necessary to repeat what has been said in these cases. *We are unable to find that the statute before us, on its face, violates any of the fundamental rights of appellants, or that it is susceptible of an interpretation which makes it necessary for the courts to strike it down.* On the contrary, there is a presumption in favor of its validity, and there has been presented to us no argument which impairs or rebuts that presumption." 196 Md. 177, 195, 76 A. 2d 332, 340. (Emphasis supplied.)

Appellant believes it is evident from the Maryland Court of Appeals' opinion that that court was of the view that it had not, by judicial construction, significantly limited or narrowed the terms of the statute as they appear on its face. First, this is the most reasonable interpretation of the words, italicized above, chosen by the court to declare that neither on its face nor by interpretation did the statute violate the federal Constitution. Second, this conclusion is compelled by the fact that the statute was held to be directed at persons who advocate "the overthrow of the Government of the United States, or of this State, through force or violence . . ." 196 Md. at 190, 76 A. 2d at 337, and "persons who are engaged in *one way or another* in the

attempt to overthrow the government *by force or violence,*" 196 Md. at 192, 76 A. 2d at 338 (First emphasis supplied), without limitation of the scope and coverage of the statute to advocacy of action or *active, intentional,* knowing membership in organizations having the purpose of overthrowing or advocating action to overthrow the government. Third, this is made finally clear by the Maryland court's reliance on the Circuit Court decision in *United States* v. *Dennis,* 188 F. 2d 201 (2d Cir. 1950), *aff'd,* 341 U. S. 494, and this Court's decision in *American Communications Association* v. *Douds,* 339 U. S. 382, the holdings of both of which have since been significantly limited by this Court. See, *e.g., Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States,* 367 U. S. 203; *Noto* v. *United States,* 367 U. S. 290; *United States* v. *Brown,* 381 U. S. 437. See particularly, *Baggett* v. *Bullitt,* 377 U. S. 360, 370 n. 8, where the Court said that in *Yates* it "made quite clear exactly what all the above terms [of the Smith Act] do and do not proscribe: '[T]he Smith Act reaches only advocacy of action for overthrow of government by force and violence.'" See also *Elfbrandt* v. *Russell,* 384 U. S. 11; *Aptheker* v. *Secretary of State,* 378 U. S. 500.

In *Baggett* this Court reviewed and declared unconstitutionally vague, broad and indefinite Washington's subversive activities law and the loyalty oath required by it. The Washington law was copied from Maryland's Ober Law and its essential provisions were identical to it. Rev. Code Wash. Ann. ch. 9.81 (1961). See *Baggett* v. *Bullitt,* 377 U. S. 360, 362-64; *Id.* at 382 (Clark and Harlan, *JJ.*, dissenting).[4] *Baggett* came to this Court on appeal from the

[4] There is an exception, insignificant here. The Washington Law expressly declared the Communist Party to be a subversive organization, Rev. Code Wash. Ann. Sec. 9.81.083; 377 U. S. at 363 n. 1.

decision of a statutory three judge District Court. 215 F. Supp. 439 (W. D. Wash. 1963). The District Court had construed the Washington Law and oath requirement in conformity with the construction of the similar Maryland statute in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950) and *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. See 215 F. Supp. at 446 n. 8, 447 n. 16, 449 n. 24, 450. Nevertheless, this Court, finding the statute too vague, struck it down.[5] Justice Clark, joined by Justice Harlan, in dissent lamented the passing of *Gerende,* saying that it "is overruled. . . ." 377 U. S. at 382. More in full, Justice Clark said:

> "It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in *Gerende,* but a review of the record in that case conclusively demonstrates to the contrary. Further, while the *Gerende* opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague." 377 U. S. at 382 note.

In apparent response the majority said that *Gerende* had merely upheld Maryland's oath and not its underlying

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The District Court in the case at bar also found that "the Washington definition [of subversive organization] included a limitation, absent in the Maryland definition, that membership be knowing." Appendix *infra* p. 10a. However, in *Gerende* this Court was evidently of the view that precisely that limitation was incorporated into the Maryland law. 341 U. S. 56-57.

[5] The Court said: "Appellants contend in this Court that the oath requirements and the statutory provisions on which they are based are invalid on their face because their language is unduly vague, uncertain and broad. We agree with this contention. . . ." 377 U. S. at 366.

statute, 377 U. S. at 368-69 n. 7, but as the Court held last year in *Elfbrandt* v. *Russell*, 384 U. S. 11, a loyalty oath, no matter how innocuous on its face,[6] cannot be passed upon in isolation, and it must be read together with its underlying and authorizing statute. See also *Dombrowski* v. *Pfister*, 380 U. S. 479, 493-94 (1965).[7]

The point that the Maryland oath must be read and passed upon with the underlying statute is further illuminated when note is taken of the fact that on the "Certification of Applicant for Public Employment", now administered by the Appellees, is printed, "Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)", see Appendix, *infra* at p. 33a. The conscientious person who himself or by counsel refers to and reads the authorizing law is squarely confronted with the statutory terms and definitions that in *Baggett* this Court declared uncon-

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[6] The Oath in *Elfbrandt* was in the following form:

"'State of Arizona, County of _____ I, _____
(type or print name)
do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of _____ (name of office) _____ according to the best of my ability, so help me God (or so I do affirm).' A. R. S. § 38-231, subs. G, as amended Laws 1961, Ch. 108, § 5." *Elfbrandt* v. *Russell*, 97 Ariz. 140, 397 P. 2d 944, 945 n. 2 (1965).

[7] The Court there said: "The statutory definition of a 'subversive organization' . . . incorporated into the offense [under Louisiana law] . . . is substantially identical to that of the Washington statute which we considered in *Baggett* v. *Bullitt*, 377 U. S. at 362, 363 n. 1. *There the definition was used in a state statute requiring state employees to take an oath as a condition of employment. We held that the definition, as well as the oath based thereon, denied due process because it was unduly vague, uncertain and broad.*" 380 U. S. at 493-94. (Emphasis supplied.)

stitutionally vague, uncertain and broad on their face. The oath in *Elfbrandt* v. *Russell*, 384 U. S. 11, quoted *supra* in note 6, contained a similar citation to the underlying Arizona statute. And with this as the only visible nexus between the oath and the statute, this Court would not read and pass upon the oath without the statute.

The Maryland certification has an additional nexus between the oath and the statute not apparent on the face of the Arizona oath. It requires affiants to make the statement that: "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)" (App. 33a). As Judge Sobeloff said below in his special concurrence, "I am inclined to agree with the plaintiff that the prescribed oath or statement is not to be judged in isolation, but in conjunction with the statute, *for in the absence of a statute, there would be no authority for demanding any statement 'under penalty of perjury.'*" Appendix, *infra* p. 16a (Emphasis supplied).[8] See also, *Georgia Conf. of AAUP* v. *Board of Regents*, 246 F. Supp. 553, 555 (N. D. Ga., 1965) (Three Judge Court).

[8] Article 85A, Section 17, expressly provides that the penalties of perjury shall apply to "[e]very written statement made pursuant to this article by an applicant for appointment or employment." Sections 11, 13 and 17 specifically provide that such statements "shall contain notice that [they are] subject to the penalties of perjury." Statutory perjury is defined by Section 435 of Article 27 of the Md. Code Annot. (1957).

B. Under long standing constitutional principle and recent decisions of this Court declaring unconstitutionally vague, uncertain and broad statutes of other states that were virtually identical to the Maryland Subversives Activities Act, particularly with respect to definitions, Maryland's statute is unconstitutionally vague, uncertain and broad on its face and as judicially construed, and the "Certification of Applicant for Public Employment" is therefore an invalid condition on public employment.

No principle of due process is better established than that which denies the government the power to enforce "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Baggett* v. *Bullitt*, 377 U. S. 360, 367; see also, *e.g.*, *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Winters* v. *New York*, 333 U. S. 507; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Connally* v. *General Construction Co.*, 269 U. S. 385; see generally, *e.g.*, Amsterdam, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960). It is also well settled that the principle is most strictly applied to statutes having a potentially inhibiting effect on speech, for fear that "the free dissemination of ideas may be the loser". *Smith* v. *California*, 361 U. S. 147, 151; see also *Aptheker* v. *Secretary of State*, 378 U. S. 500. Further, in recent years this Court has expressly ruled that when loyalty oaths and the statutes pursuant to which they are made conditions precedent to public office or employment are unduly vague, uncertain and broad, they inhibit constitutionally protected expression, belief and association and are therefore invalid, *Elfbrandt* v. *Russell*, 384 U. S. 11; *Baggett* v. *Bullitt*, 377 U. S. 360; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; see also, *Georgia Conf. of AAUP* v. *Board of Regents*,

246 F. Supp. 553 (N. D. Ga., 1965) (Three Judge Court); *Brush* v. *State,* Cir. Ct. Lane County, Oregon, October 14, 1965 (currently on appeal to the Oregon Supreme Court); *Hurwitz* v. *Director's Guild of America,* 364 F. 2d 67 (2d Cir. 1966); Morris, *Baggett* v. *Bullitt: Scienter & "Guiltless Knowing Behavior",* 1 LAW IN TRANSITION Q. 185 (1964).

As pointed out earlier, the essential provisions of the subversive activities law of the State of Washington, declared unconstitutional in *Baggett* v. *Bullitt,* 377 U. S. 360, are identical with and were in fact copied from Maryland's Ober Law. As the Court said in *Baggett,* 377 U. S. at 368-370, the statute was unconstitutionally vague, broad and uncertain. See also, *Cramp* v. *Board of Public Instruction,* 368 U. S. 278; *Dombrowski* v. *Pfister,* 380 U. S. 479.

Recently the Court also voided Arizona's loyalty oath for public employees and its accompanying statutory gloss, which penalized mere knowing membership in an organization having as one of its purposes the violent overthrow of government. The Arizona scheme's defect was that it was overly broad, impinging on constitutionally protected freedoms of expression and association, for it applied even "to membership without the 'specific intent' to further the illegal aims of the organization . . ." *Elfbrandt* v. *Russell,* 384 U. S. 11, 19. See also *Aptheker* v. *Secretary of State,* 378 U. S. 500; *compare, Noto* v. *United States,* 367 U. S. 290, *with, Scales* v. *United States,* 367 U. S. 203; *cf. Gibson* v. *Florida Legislative Committee,* 372 U. S. 539, 543-46; *Shelton* v. *Tucker,* 364 U. S. 479. The same defect resides in the Maryland statute as judicially construed in *Shub* v.

Simpson, 196 Md. 177, 76 A. 2d 332 (1950); and *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. See Article 85A, Sections 1, 3, 10, 11, 13, 14 and 15 of the MD. CODE ANNOT. (1957).

As also pointed out earlier, this is made particularly clear by the fact that in *Shub,* the Maryland Court of Appeals expressly relying on the Second Circuit decision in *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), without the limiting clarification later provided by, *e.g., Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States,* 367 U. S. 203; *Noto* v. *United States,* 367 U. S. 290; see *Baggett* v. *Bullitt,* 377 U. S. 360, 370 n. 8, ruled that the Maryland statute covers those who advocate "the overthrow of the Government of the United States, or of this State, through force or violence . . .", 196 Md. at 190, 76 A. 2d at 337, without restricting coverage to advocacy of action or *active, intentional,* knowing membership in organizations having the purpose of overthrowing or advocating action to overthrow the government. And this Court obviously recognized and approved the overly broad interpretation, by ruling acceptable the oath proffered by the Attorney General of Maryland according to which the affiant attested that he was not "knowingly a member of an organization engaged in such an attempt," *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56-57. The Court thereby approved an oath and statute that are now invalid under current standards for they are "not restricted in scope to those who join [such an organization] with the 'specific intent' to further its illegal action . . ." *Elfbrandt* v. *Russell,* 384 U. S. 11, 17.

"Out of an abundance of caution," see Tr. p. 14, according to the Attorney General of Maryland, immediately follow-

ing the *Elfbrandt* decision, he deleted from the oath administered to applicants for positions with the University, the phrase "knowingly a member of an organization engaged in such an attempt". See Appendix, *infra* p. 33a. This deletion, compelled by *Elfbrandt,* however, was to no avail.

The affiant is still required to certify that he is "not engaged in *one way or another* in the attempt to overthrow the Government . . ." Appendix, *infra* at p. 33a. (Emphasis supplied.) The emphasized phrase, also approved by this Court in *Gerende,* 341 U. S. 56, however, is not self-defining. In fact, to determine what it means, one must turn to the authorizing statute and its judicial interpretation, for without a defining gloss, the phrase unquestionably suffers from just the defect of vagueness the Court found unconstitutional in *Baggett* v. *Bullitt,* 377 U. S. 360, 366-70 (1964),[9] and just the defect of breadth struck down in *Elfbrandt* v. *Russell,* 384 U. S. 11 and *Aptheker* v. *Secretary of State,* 378 U. S. 500, 510-14.

But the statute and the judicial construction that has been placed upon it, do not sufficiently clarify the meaning of the phrase. Quite the contrary, when, for example, asked by Judge Winter at the hearing below, the only definition the Attorney General of Maryland could put on the phrase "in one way or another", was to say:

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[9] It is noteworthy that in *Baggett* v. *Bullitt,* 377 U. S. 360, 368-69 n. 7, the Court left this phrase out when it quoted the terms of the oath that it said had been found to be acceptable in *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56-57. As a matter of fact, in *Gerende,* the Court, quoting from the decision of the Court of Appeals of Maryland, included precisely this phrase in what the Court found to be the "acceptable" affidavit.

> "I think it probably means in any way, or by any available means. I think it means in one way or another, precisely what it says. It's unfortunate that the English language lacks the precision which perhaps we might like it to have, but I think it means just that: In one way or the other, in any way." (Tr. 18).

Appellant submits that if the phrase means anything less expansive than this circular definition, it could only mean advocating "the overthrow of the Government . . . through force or violence . . ." *Shub* v. *Simpson*, 196 Md. 177, 190, 76 A. 2d 332, 337, without limitation to advocacy of action or *active, intentional,* knowing membership, and it is therefore still too broad or vague.[10]

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[10] The failure of the *Shub* and *Gerende* decisions to clarify the meaning of the Maryland statute can further be seen in the fact that those administering the oath requirement have been unable to settle on a particular and clear certification. Until recently even under the Attorney General's view, the oath required of applicants for public employment was cast in terms that were much broader than those found acceptable by this Court in *Gerende*. Most notably, up to May 3, 1966, after this Court's decision in *Elfbrandt*, the oath approved by the Attorney General required the oath-taker to certify "that I am not a subversive person as defined by law, namely . . ." (followed by the language approved in *Gerende*). (See Tr. 9.) Moreover, at the hearing before the District Court in this case, it developed that various oaths, some very broad, were and still are extracted by various agencies of the State of Maryland and its political sub-divisions, presumably pursuant to Article 85A. (See Tr. 43.) See also § 3(c) of Article 10, MD. CODE ANNOT. (1957) (Qualification for admission to the Bar); Rule Second, Rules Governing Registration of Law Students and Admission to the Bar of Maryland, 9A MD. CODE ANNOT. p. 233 (1957), which says: "The application [for registration as a law student] shall also state that the applicant is not a subversive person as defined by the Subversive Activities Act of 1949." (These rules were adopted by the Court of Appeals of Maryland on June 10, 1955 and amended on January 16, 1958 and July 21, 1965, long after this Court's decision in *Gerende*.)

Even assuming that the recent deletion from the Maryland oath is meaningful, and, also, that under Section 11 of Article 85A, the Attorney General had the authority to eliminate from the oath the phrase "knowingly a member of an organization engaged in such an attempt" and also has the authority to delete the phrase "in one way or another", it is Appellant's contention that the oath would still have to fail. For, as discussed above, the oath must be read and passed upon with its underlying and authorizing statute, and, although the oath may be within his control, the Attorney General has no authority to change the meaning of that judicially construed statute. As Justice Frankfurter said during the very term in which *Gerende* was decided:

> "The Attorney General did not give this assurance [in *Gerende*] as a matter of personal relaxation of a legal requirement. He was able to give it on the basis of the interpretation that the Court of Appeals of Maryland, the highest court of that State, had placed upon the legislation." *Garner* v. *Board of Public Works*, 341 U. S. 716, 727 (Frankfurter, J. concurring).[11]

And when penalties of perjury are provided to enforce oath taking requirements, this Court has made it clear that the fact that the oath itself might be innocuous on its face will not insulate it from examination in the context of the statute authorizing it and providing penalties for its enforcement. *Elfbrandt* v. *Russell*, 384 U. S. 11.

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[11] In *Georgia Conf. of AAUP* v. *Board of Regents*, 246 F. Supp. 553, 555 (N. D. Ga. 1965) the three judge court said: "The oath which the State School Superintendent has substituted for the oath prescribed in the 1935 statute has not been objected to by plaintiffs, but we say in passing that it seems to be without statutory basis."

Moreover, when penalties of perjury are provided, the Court has recently said that it will not rely on the fairmindedness of prosecutors to limit otherwise unduly vague, uncertain and broad statutes requiring oaths. *Baggett* v. *Bullitt*, 377 U. S. 360 at 373-74; *Elfbrandt* v. *Russell*, 384 U. S. 11; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 286-287; see also, *Dombrowski* v. *Pfister*, 380 U. S. 479, 493-94. And as the Court said in *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515, 517-18, the fact that a statute having an inhibiting effect upon First Amendment and other essential personal rights may have been constitutionally applied in the particular case does not insulate it from attack on its face. See also *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98; *NAACP* v. *Button*, 371 U. S. 415, 432-33.

C. The definitional and oath provisions of Article 85A being unconstitutionally vague, uncertain and broad, the entire statute must fall notwithstanding the inclusion in it of a standard severability clause.

Despite Section 18, of Article 85A, the severability provision, the entire statute must fall. It is well established that severability clauses are of no avail when the valid and invalid portions of a statute are so inextricably intertwined, connected and interdependent in subject matter and purpose as to preclude the presumption that the legislature would have passed one portion without the others. On the contrary, when the provisions of a statute are so interrelated the conclusion is compelled that the legislature would not have done so. *E.g., Railroad Retirement Board* v. *Alton R.R.*, 295 U. S. 330, 361-62; *Huebech* v. *City of Baltimore*, 205 Md. 203, 107 A. 2d 99 (1954); SUTHERLAND, STATUTORY CONSTRUCTION, Sections 2418, 2407, 2404 (3rd Ed., 1943).

This is especially true of statutes embodying criminal or penal provisions. See SUTHERLAND, *supra*, Section 2418.

Article 85A is a unified scheme comprised of interdependent provisions, including criminal and penal ones, to control subversive activities in Maryland. See Maryland Senate Joint Resolution No. 2, Special Session, 1948 LAWS OF MARYLAND 158 (1948 Extraordinary Session); REPORT OF THE COMMISSION ON SUBVERSIVE ACTIVITIES TO GOVERNOR WILLIAM PRESTON LANE, JR., AND THE MARYLAND GENERAL ASSEMBLY (January, 1949); 1949 LAWS OF MARYLAND 96, *et seq.* (setting forth the Act's preamble); see also, Prendergast, *Maryland: The Ober Anti-Communist Law*, in THE STATES AND SUBVERSION 140 (Gellhorn, ed. 1952). At the heart of Maryland's anti-subversion statute are the definitions contained in Section 1. Every other significant section of the statute depends on and makes reference to these definitions, which under *Baggett* v. *Bullitt*, 377 U. S. 360 and *Elfbrandt* v. *Russell*, 384 U. S. 11, constitute the major defect in the statute. It is therefore clear that notwithstanding the severability clause, the entire statute as construed, not only the oath and the provisions providing for it, must fall.

II.

Loyalty oaths, including Maryland's, that are indiscriminately required of all public employees and applicants for public employment, particularly teachers, are unconstitutional infringements on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution.

The indiscriminate requirement of a loyalty oath as a condition of public employment violates the due process clause of the Fourteenth Amendment and through it the First Amendment to the United States Constitution by unduly infringing upon the protected freedoms of expression, conscience, belief, religion, association, and academic freedom.

The case at bar differs fundamentally from most past cases decided by this Court dealing with related areas. One significant distinction is that this case does not involve any orderly inquiry or questioning by state officials seeking relevant information.[12] The Appellant has not been asked to specify, particularize, elaborate, discuss or even present facts or data bearing on his fitness as a teacher. What he is required to do is to make one and only one response to a question that assumes general irresponsibility—and the correct answer has been prescribed by the legislature. Failure to make answer or to give the prescribed one has automatically barred the Appellant from teaching at the Uni-

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[12] It requires no elaboration that there are limitations, in the interest of the First Amendment, on even this kind of state activity, and that repressive means of securing legitimate ends must fall if means less restrictive of First Amendment interests are available. See *Shelton* v. *Tucker*, 364 U. S. 479.

versity of Maryland despite the fact that he would have been a valuable addition to the faculty of the University.[13]

The case of *Adler* v. *Board of Education*, 342 U. S. 485, in which New York's Feinberg Law was upheld in a declaratory judgment proceeding, is not dispositive of the present case. First, failure to execute the required certification was, under New York law, only *prima facie* evidence of disqualification. Moreover, the New York law, unlike Maryland's, made substantial provision for "full hearing with the privilege of being represented by counsel and the right to judicial review" before an applicant was denied employment. 342 U. S. at 490-91.[14]

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[13] The lack of any legitimate intention to gather information from particular persons dealing with their competency distinguishes this case from *Beilan* v. *Board of Education*, 357 U. S. 399. It also distinguishes this case from such cases as *Lerner* v. *Casey*, 357 U. S. 468; *Nelson* v. *Los Angeles County*, 362 U. S. 1; *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Konigsberg* v. *State Bar of California*, 366 U. S. 36; *In re Anastoplo*, 366 U. S. 82. In addition, none of these five cases involved school teachers. The first two involved other kinds of municipal employees and the last three involved admission to the Bar. The significance of this distinction is taken up *infra* in the text.

[14] As Judge Sobeloff said in his special concurrence in the case at bar, Appendix *infra* at p. 17a note, the present New York law, which this Court currently has under review, continues to carry these or additional limitations:

> "Keyishian v. Board of Regents, —— F. Supp. —— (W. D. N. Y. Jan. 5, 1966); prob. juris. noted, 384 U. S. 998 (1966), decided prior to the Supreme Court's decision in *Elfbrandt*, may be distinguishable from the case at bar. There is no New York equivalent to the 'loyalty pledge' subject to penalties for perjury, that is before us today. Furthermore, as the three-judge district court emphasized, New York State, in requiring of a prospective employee the assurance that he has complied with the laws under attack in *Keyishian*, affords the applicant an opportunity to be heard, should he be in doubt as to the coverage of the statutes."

Adler is further not dispositive of the present case because it was decided under the now discredited doctrine that public employment is a privilege as opposed to a right. The great growth of government activity, the multiplication of the categories of people in government employment and the ever increasing absolute and relative number of people on federal, state and local government payrolls dictate the reality that government employment cannot be treated in law as a mere privilege. Indeed, in a significant line of cases since *Adler*, the Court has recognized this fact of our social, political and economic life. As the Court said in *Wieman* v. *Updegraff*, 344 U. S. 183, 192 (1952), "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Or as the Court more recently said in *Torcasso* v. *Watkins*, 367 U. S. 488, 495-96, "The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." See also, *Elfbrandt* v. *Russell*, 384 U. S. 11; *Baggett* v. *Bullitt*, 377 U. S. 360; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Shelton* v. *Tucker*, 364 U. S. 479; *Heckler* v. *Shepard*, 243 F. Supp. 841 (E. D. Idaho, 1965) (Three-Judge Court); *Keyishian* v. *Board of Regents*, 345 F. 2d 236, 239 (2d Cir. 1965).[15]

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[15] In these and additional cases, the Court has disclosed that unconstitutional conditions may not be interposed on the enjoyment of interests that traditionally had been classified as mere "privileges", evincing a general breakdown in the conceptualistic "privilege-right" dichotomy. See, *e.g.*, *Lamont* v. *Postmaster General*, 381 U. S. 301; *Schneider* v. *Rusk*, 377 U. S. 163; *Sherbert*

When this developing principle of affording protection to persons seeking to obtain or retain public employment is viewed in the light of the Court's increasing emphasis on the freedoms protected by the First Amendment, see, *e.g.*, *De Gregory* v. *Attorney General of New Hampshire*, 383 U. S. 825; *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Gibson* v. *Florida Legislative Committee*, 372 U. S. 539, freedoms upon which across-the-board loyalty oaths encroach so dangerously, it becomes apparent that the basis for *Adler* has been removed. Similarly undermined by these developments has been *Garner* v. *Board of Public Works*, 341 U. S. 716, in which a loyalty affidavit requirement of the City of Los Angeles was upheld. In addition, the *Garner* decision relied heavily on an understanding of the prohibition against bills of attainder that no longer has vitality. See *United States* v. *Brown*, 381 U. S. 437, discussed *infra* under point IV.

Besides *Garner's* lack of continued vitality, it is also distinguishable from the case at bar. The present case, brought by a teacher, presents issues of freedom of speech and conscience in one of the most significant and sensitive contexts, that of academic freedom. As Henry Steele Commager, the distinguished historian, has so eloquently written:

> "Freedom is guaranteed to the scholar so that he will be able to inspire in the young a passion for truth, and so that he can present to them, in his own life and conduct, an example of the search for truth. It is guaranteed to the scholar so that he can train new generations

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v. *Verner*, 374 U. S. 398; *Speiser* v. *Randall*, 357 U. S. 513; see also, *e.g.*, *Lawson* v. *Housing Authority of Milwaukee*, 270 Wis. 269, 70 N. W. 2d 605, *cert. denied*, 350 U. S. 882.

of technicians and public servants who will freely exercise their intelligence on behalf of their society. It is guaranteed to the scholar so that he can engage, fearlessly and vigorously, in pushing outward the boundaries of knowledge in every field.

Academic freedom is, like other freedoms, a device for avoiding error and arriving at truth. We take this for granted in the realm of science. We should take it equally for granted in the realm of social thought." Commager, *Is Freedom an Academic Question?*, Saturday Review, June 20, 1964, 54, 56.

This court has long recognized the important constitutional dimension of academic freedom. In *Barenblatt* v. *United States*, 360 U. S. 109, 112, the Court said: "Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain." In an earlier case, still subsequent to *Garner* and *Adler*, four Justices speaking for the Court further addressed the thorny questions of academic freedom and attested to that freedom's overwhelming importance and scope, saying:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so

> thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250.[16]

See also, *e.g.,* EDUCATIONAL FREEDOM IN AN AGE OF ANXIETY (Hullfish, ed., 1953); MACIVER, ACADEMIC FREEDOM IN OUR TIME (1955); LAZARSFELD AND THIELENS, THE ACADEMIC MIND (1958); Morris, *Academic Freedom and Loyalty Oaths,* 28 LAW AND CONTEMPORARY PROBLEMS 487 (1963); Murphy, *Academic Freedom—An Emerging Constitutional Right,* 28 LAW AND CONTEMPORARY PROBLEMS 447 (1963). The Court in the *Sweezy* case clearly recognized and gave protection to academic liberty which is at the core of the First Amendment. Thus coming out of that Amendment is a preferred position for intellectual freedom. Unjustified

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[16] Justice Frankfurter, in his important concurring opinion to *Wieman* v. *Updegraff,* 344 U. S. 183, 195, also stressed the peculiar legal significance of academic freedom saying: "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards to those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

encroachment on this freedom or liberty by such requirements as are provided by Article 85A cannot be tolerated and are clearly unconstitutional.

The earlier cases upholding across-the-board loyalty tests must also be viewed in the light of the development into an inescapable principle that "[w]here there is a significant encroachment upon personal liberty [particularly that protected by the First Amendment], the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U. S. 516, 524.[17] It is now clear that in these cases it is the state which must carry the burden of showing a substantial relationship between its regulation, prohibition or demand and a subject of overriding and compelling state interest. *E.g.*, *Gojack* v. *United States*, 384 U. S. 702; *De Gregory* v. *Attorney General of New Hampshire*, 383 U. S. 825; *Gibson* v. *Florida Legislative Committee*, 372 U. S. 539; *Sweezy* v. *New Hampshire*, 354 U. S. 234; *cf. Griswold* v. *Connecticut*, 381 U. S. 479.

Although *Bates*, *Gojack*, *De Gregory*, *Gibson* and *Sweezy*, all dealt with legislative investigations, the principle they established, as to state's burden of showing compelling and subordinating interests to impinge First Amendment rights, is equally applicable to the realm of loyalty oaths. *Lawson* v. *Housing Authority of Milwaukee*, 270 Wis. 269, 70 N. W. 2d 605 (1955), *cert. denied*, 350 U. S. 882.

During the fifteen years that Maryland has had its Ober Law and oath, the state has prosecuted no one for sub-

[17] Notably, this was not the test applied by the Maryland Court of Appeals in *Shub* v. *Simpson*, 196 Md. 177, 195, 76 A. 2d 332, 340 (1950). In upholding the Ober Law, the Maryland court viewed it through "a presumption in favor of its validity."

versive activities and no one has been discharged on this ground. *Cf. Poe* v. *Ullman*, 367 U. S. 497. Several conscientious people have been denied employment or discharged because they refused to execute the test oath. See, *e.g.*, Prendergast, *Maryland: The Ober Anti-Communist Law*, in THE STATES AND SUBVERSION (1952, Gellhorn, ed.) at 140, 169-170. No doubt a larger number of conscientious and qualified persons has decided not to enter the state's employ because they abhor test oaths—much to the state's loss. Weighing the ineffectiveness of the Ober Law and oath against the tragically inhibiting effect of such oaths and laws, particularly with respect to teachers, see, *e.g.*, LAZARSFELD AND THIELENS, THE ACADEMIC MIND 84-85, 192, 197, 204, 240, *passim* (1958), on the preferred First Amendment freedoms, and considering that the state can achieve its legitimate ends in less stultifying ways, *Shelton* v. *Tucker*, 364 U. S. 479, 488, for example through the ordinary criminal processes or through systems of specific inquiry when reasonable ground exists for questioning loyalty, the conclusion is compelled that oaths such as Maryland's, and the statutes that require them, are unconstitutional conditions on public employment.

III.

The Maryland Subversive Activities Act of 1949 and the "Certification of Applicant for Public Employment", required pursuant to it, infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law.

Under Article 85A, upon refusing to execute the required "Certification of Applicant for Public Employment", the Appellant (and all others similarly situated) was automatically rendered ineligible for public employment. The statute makes no provision for a hearing at which the Appellant would be afforded an opportunity to explain his reason for refusing to execute the oath. *Compare Heckler* v. *Shephard,* 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge Court declaring Idaho law, not providing such hearings, unconstitutional), *with, Keyishian* v. *Board of Regents,* —— F. Supp. ——, Civil Action No. 10,994 (W. D. N. Y. Jan. 5, 1966) (Three Judge Court upholding New York law with provisions for such hearings), *probable jurisdiction noted,* 384 U. S. 998. Numerous circumstances can be conceived, moreover, which would cause a person to refuse to execute the oath, required under this statute, and which would in no way reflect on the person's loyalty or fitness for the job. For example, a person might be associated with a "subversive organization" or "in one way or another engaged in the attempt to overthrow the Government" for purposes of counter-espionage or for scholarly

or other field study. *Compare, e.g., Aptheker* v. *Secretary of State,* 378 U. S. 500, 511-12; *Baggett* v. *Bullitt,* 377 U. S. 360, 367-70. In addition, as is the case here, a person might refuse to execute this oath on conscientious grounds or because he finds it offensive or insulting. See, *e.g., Torcaso* v. *Watkins,* 367 U. S. 488; *Sherbert* v. *Verner,* 374 U. S. 398; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *cf., e.g., De Gregory* v. *Attorney General of New Hampshire,* 383 U. S. 825.

In *Slochower* v. *Board of Education of New York,* 350 U. S. 551, 559, the Court said:

> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law."

Accord, Heckler v. *Shepard,* 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge Court); see also, *Nelson* v. *Los Angeles County,* 362 U. S. 1, 8 n. 5; *Nostrand* v. *Little,* 362 U. S. 474, 475, *on remand,* 58 Wash. 2d 111, 361 P. 2d 551, 566-567 (1961), *appeal dismissed, per curiam,* 368 U. S. 436; *Baggett* v. *Bullitt,* 377 U. S. 360, 384 (Clark and Harlan, *J.J.,* dissenting); *cf. Konigsberg* v. *State Bar of California,* 366 U. S. 36; *In re Anastaplo,* 366 U. S. 82. And in recent cases concerning control of obscenity, the Court has made further clear the importance of hearings when First Amendment rights may be jeopardized by government action. See, *e.g., A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Bantam Books* v. *Sullivan,* 372 U. S. 58; *Marcus* v. *Search Warrant,*

367 U. S. 717. *Cf. Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144; *Schneider* v. *Rusk*, 377 U. S. 163 (by implication).

Maryland's loyalty oath and the statutory provisions pursuant to which it is required as a condition to public employment may, although it is unlikely, exclude some disloyal or otherwise unfit employees, but it certainly also excludes loyal and fit employees, who are highly conscientious and sensitive, without according them any opportunity to explain their refusals to execute the oath. Such indiscriminate classification of the innocent with knowing activity offends due process of law. *E.g.*, *Wieman* v. *Updegraff*, 344 U. S. 183; *Elfbrandt* v. *Russell*, 384 U. S. 11. A meaningful opportunity must be afforded an employee, or a potential employee, *cf. Torcaso* v. *Watkins*, 367 U. S. 488; Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW AND CONTEMPORARY PROBLEMS 447, 481-484 (1963), to prove his fitness despite his refusal to take the oath. See, *e.g.*, *Slochower* v. *Board of Education of New York*, 350 U. S. 551; *Heckler* v. *Shepard*, 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge Court). No such opportunity is provided the applicant for employment under Maryland's Subversive Activities Law of 1949. See Article 85A, Sections 11 and 13.

In *Speiser* v. *Randall*, 357 U. S. 513, this Court struck down a California oath which was required before property owners could qualify for a tax exemption. The Court held that since the oath infringed upon freedom of expression, and, since it did so by using a procedure that placed "the burdens of proof and persuasion on the taxpayer [it was] . . . a violation of due process of law." 357 U. S. at 529. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due

process, appellants were not obliged to take the first step in such a procedure," *ibid,* namely, to execute the oath as a condition of obtaining a tax exemption.

Speiser applies to this case in at least two ways. On the one hand, the Appellant here has been required, as the appellants were in *Speiser,* to take the first step, execution of the oath, in an invalid series of steps which are procedurally defective, namely, they deprive the Appellant of due process because, as pointed out above, the Maryland Subversive Activities Law does not offer any hearing to an applicant who declines to execute the oath or who desires a clarification of its meaning. There can be no doubt of the burden on free expression in this case. Secondly, as in *Speiser,* there is a shifting of the burdens of persuasion and proof, under the threat of perjury prosecution and loss or refusal of employment, which achieve the same practical, but constitutionally forbidden result: The deterrence of free expression which was disallowed in *Speiser.* In that case, the Court stated:

> "The vice of the present procedure is that, when particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, *cf., Dennis* v. *United States, supra,* provide but shifting sands on which the litigant must maintain his position. How can

a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the state could not command directly. It can only result in a deterrence of speech which the constitution makes free." 357 U. S. at 526.

The philosophy of the *Speiser* decision was followed by the Court in *Freedman* v. *Maryland,* 380 U. S. 51, where it was held that the burden of going forward with the evidence and of persuasion that a motion picture is censorable must be placed on the censor. *Cf. also, Smith* v. *California,* 361 U. S. 147. The same basic problem was also handled by this Court in *Lamont* v. *Postmaster General,* 381 U. S. 301, 307, where the Court held that the requirement that " . . . the addressee in order to get his [allegedly foreign political propaganda] mail must request in writing that it be delivered . . . amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment rights."

Maryland's loyalty oath, and the statute under which it is required, clearly places the burdens of persuasion and proof onto Appellant, and others similarly situated, necessarily resulting in an undue deterrence of speech which the Constitution makes free. The Maryland scheme presumes the guilt, and non-employability of all persons, presuming either that they advocate the prohibited doctrines or that they are mere knowing members of the prohibited organizations or that they are active and violent revolutionaries. If and only if an affiant comes forward and executes the expurgatory oath may he become a member of the favored group, the group eligible for state employment. The oath is exacted from all alike—the loyal and disloyal.

In other words, the oath presumes non-employability and then shifts onto applicants the task of understanding the complex statutory definitions of subversion and then, without opportunity for hearing, requires applicants to make their declarations. This act and oath, also, therefore, are "at war with . . . the First Amendment." *Lamont* v. *Postmaster General,* 381 U. S. 301, 307. And, as the Court recently said in *Elfbrandt* v. *Russell,* 384 U. S. 11, 17-18: "The unconstitutionality of this Act follows *a fortiori* from *Speiser* v. *Randall,* 357 U. S. 513, where we held that a State may not even place on an applicant for a tax exemption the burden of proving that he is not engaged in criminal advocacy."

IV.

The required "Certification of Applicant for Public Employment" and the statute pursuant to which it is given constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution.

The provisions of Article 85A and oath given pursuant to it constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution. The oath in question is a test oath, punishing Appellant and others similarly situated, legislatively without any adjudicatory process. The oath functions to deprive otherwise fully qualified and competent employees and applicants for employment of their employment, good consciences, professional integrity and political rights.

In *Cummings* v. *Missouri,* 71 U. S. (4 Wall.) 277, 320, the Court held: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment . . ." and that statutory or state constitutional provisions having that

effect constituted bills of attainder. At issue, and struck down, in the particular case were state constitutional provisions that required the taking of a test oath as a condition of, among other things, holding public office or employment or voting. See also *Ex parte Garland*, 71 U. S. (4 Wall.) 333. In *United States* v. *Lovett*, 328 U. S. 303, denial of compensation for federal employment was also held a sufficient deprivation to invalidate a statute as a bill of attainder.

It is true that the Court has more recently several times rejected the attainder argument in loyalty oath cases. *E.g.*, *Garner* v. *Board of Public Works*, 341 U. S. 716, 722-23. But recently there has been considerable change in the law relating to bills of attainder. In *United States* v. *Brown*, 381 U. S. 437, the Court struck down the provisions of the federal Landrum-Griffin Act which made it criminal for Communists to hold leadership positions in labor unions. Whatever may have been the purpose of the disqualification, and despite the absence of any disqualification of named persons, the Court found the whole scheme violative of the attainder clause of the Constitution. The relevance of that case to the present one is significant. After a careful review of the ingredients of the Bill of Attainder decisions, one commentator recently concluded that disclaimer-type loyalty oaths, viewed in the contexts of their authorizing statutes, raise serious attainder problems:

> "Such oaths contain the three elements necessary for a finding of a bill of attainder. The individuals subject to the sanctions of such oaths are identified with the required specificity, since it is only members of politically unpopular organizations who suffer the deprivations prescribed under the oath. The sanction imposed—disqualification from a particular job—is

punishment appropriate in a bill of attainder context. And the sanction is imposed automatically, without judicial intervention. The person who cannot truthfully subscribe to the oath is denied employment." Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 Calif. L. Rev. 212, 250-51 (1966).

Thus the fact that criminal punishment does not follow is no longer dispositive of the attainder question; a loyalty test which carries the sanction of loss or denial of employment may be just as much a bill of attainder as one which imposes the sanction of imprisonment or loss of life. Although this Court has not yet invalidated a loyalty oath on attainder grounds, there has been no warrant for this Court to reach the question in any of its recent cases. But any oath which passes muster against other constitutional attacks, must today withstand additional scrutiny on attainder grounds. The Ober Oath and its authorizing statute cannot, as we have already argued, survive the other constitutional arguments raised. But even if it could, that oath nevertheless represents an unconstitutional bill of attainder.

CONCLUSION

As discussed above, examination of the recent decisions of this Court raises serious constitutional doubts as to the validity of Maryland's loyalty oath requirement, and the statute that makes it a condition precedent to public employment, and subjects to question the current status of this Court's 1951 decision in *Gerende*, upholding the Maryland oath and the authorizing law. Arising in a context in-

volving a detrimental incursion into the protected province of academic freedom, this case therefore presents substantial federal questions that merit the full consideration of this Court.

Respectfully submitted,

SANFORD JAY ROSEN
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

ARNOLD M. WEINER
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202

ELSBETH LEVY BOTHE
41 West Preston Street
Baltimore, Maryland 21201

JOSEPH S. KAUFMAN
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202

Attorneys for Appellant

LEE M. MILLER
1100 One Charles Center
Baltimore, Maryland 21202
Of Counsel

November 1966

APPENDIX

Opinion of Winter, *Circuit Judge*

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

HOWARD JOSEPH WHITEHILL, JR.,

Plaintiff,

—VS.—

WILSON ELKINS, President, University of Maryland; BOARD OF REGENTS, University of Maryland; J. JEROME FRAMPTON, JR., President, State Board of Education,

Defendants.

Filed: September 8, 1966.

Before:

SOBELOFF and WINTER, *Circuit Judges,* and
THOMSEN, *Chief Judge.*

Sanford Jay Rosen, Esq., Arnold M. Weiner, Esq., Mrs. Elsbeth Levy Bothe, Joseph S. Kaufman, Esq., and Lee M. Miller, Esq., Attorneys for Plaintiff.

Thomas B. Finan, Esq., Attorney General of Maryland, Robert C. Murphy, Esq., Deputy Attorney General of Maryland, Loring E. Hawes, Esq., and Julius A. Romano, Esq., Assistant Attorneys General of Maryland, Attorneys for Defendants.

Opinion of Winter, Circuit Judge

WINTER, *Circuit Judge*:

This action, brought under the Civil Rights Act, 42 U.S.C.A. § 1983, and invoking the civil rights and declaratory judgment jurisdiction of this Court, 28 U.S.C.A. §§ 1343(3), 2201 and 2202, seeks to enjoin the oath requirements of the Maryland Subversive Activities Act of 1949, 8A Annotated Code of Maryland (1964 Ed.), Article 85A, §§ 1, *et seq.* exacted of public employees as a condition precedent to public employment. Defendants' motion to dismiss admits the facts well pleaded, which are as follows:

Plaintiff is a member of the faculty of The Johns Hopkins University, teaching creative writing, an author, and a practicing member of the religious organization known as the Society of Friends. Plaintiff was engaged as a visiting lecturer in English at the University of Maryland, College Park, Maryland, for the academic year of 1966-1967. In July, 1966, a formal contract embodying the conditions of his employment was forwarded to plaintiff. He was also forwarded a document entitled "Certification of Applicant for Public Employment," which contained a loyalty oath.[1] Plaintiff was advised that he must sign it as a condition precedent to his employment. Plaintiff executed his employment contract, but declined to execute the loyalty oath.

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[1] While this opinion uses the popular parlance "oath," technically plaintiff was required to make a written statement of his loyalty, under the penalties of perjury prescribed by 3 Annotated Code of Maryland (1957 Ed.), Art. 27, § 439. The document itself was entitled "Certification of Applicant for Public Employment" and the operative words were "I, _____ do hereby certify * * *." Article 39 of the Maryland Declaration of Rights guarantees the right of any person to affirm, rather than swear, agreeably to his religious beliefs, and 1 Annotated Code of Maryland (1957 Ed.), Article 1, § 9 implements this guarantee.

He was immediately advised by an authorized representative of the University of Maryland that that educational institution would not accept his services without the loyalty oath first having been executed by him. Plaintiff declined to sign this oath and has now brought this suit, seeking a declaration that the oath sought to be exacted from him was unconstitutional and seeking to enjoin defendants from preventing the consummation of his contract with the University of Maryland because of his failure to execute the oath.[2] Pursuant to prayer in the complaint, a statutory three-judge court was immediately convened, 28 U.S.C.A. §§ 2281 and 2284, and the case heard as promptly as possible, inasmuch as plaintiff's employment was to begin September 19, 1966.

The oath sought to be exacted from plaintiff is as follows:

> "CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)
>
> "I, ... do hereby
> (Print Name—including middle initial)
> certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

[2] Included among the defendants is J. Jerome Frampton, Jr., president of the Maryland State Board of Education. This board has no power with regard to the University of Maryland, the government of which is vested in its Board of Regents. 7 Annotated Code of Maryland (1965 Ed.), Article 77 § 249(e). The motion to dismiss will be granted as to this defendant for improper joinder.

"I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

Date .....

Signature .....
(Name—including middle initial)

In his complaint plaintiff alleges that the loyalty oath is unconstitutional, because it infringes on his First and Fourteenth Amendment rights, is so vague as to deny him due process, and equal protection of the laws, and constitutes a bill of attainder against him. Additionally, plaintiff obliquely alleged that the oath would deny him freedom of religion, but in argument plaintiff made no contention that any specific religious belief held by him was counter to the certification that he was asked to make.

Article 85A of the Annotated Code of Maryland was enacted in its entirety in 1949 and has never been amended. Of the provisions pertinent to this case, § 10 renders ineligible for employment by the state any person who is a "subversive" person as defined in this Article. Section 13 required state employees who were such on June 1, 1949, the effective date of the Act, to make a written statement, subject to the penalties of perjury, that he or she was not a "subversive" person as defined in Article 85A, and § 11 requires every department, board, commission or other agency of the State of Maryland or any political subdivision thereof in the appointment of new employees, to establish procedures, by rules, regulations or otherwise, to

ascertain that any employee "including teachers and other employees of any public educational institution in this state" is not a "subversive" person as defined in the Article. The Attorney General of Maryland, in reliance upon these sections, has expressed the view that persons rendering occasional instructional services to the University of Maryland as part of the formal instruction program are required to execute the loyalty oath pledge. 45 Opinions Attorney General 187 (1960).

The operative words "subversive person" are defined by § 1, which reads:

> "'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of subversive organization or a foreign subversive organization."

Because one is a "subversive person" if he is a member of a "subversive organization" or a "foreign subversive organization," the definitions of those terms, as set forth in § 1 of Article 85A, should also be stated. They are:

> "'Subversive organization' means any organization which engages in or advocates, abets, advises, or

teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence.

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of, the United States, or of the State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means."

While plaintiff asserts a denial of his First and Fourteenth Amendment rights to freedom of speech and freedom of association as well as equal protection of the laws,

the first substantive issue we must decide is whether the oath is so broad, vague and indefinite that plaintiff has been denied due process of law. This is so because plaintiff's First and Fourteenth Amendment rights are not violated if the oath is valid under the due process clause; they have been violated only if the oath will not withstand the due process test. *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966).[3] Of course, the presence of First and Fourteenth Amendment rights buttresses the strictness of the due process requirement. We turn first to whether the oath is so broad, vague and indefinite as to deny due process of law.

The validity of Article 85A under state and federal law was sustained in the state courts in *Shub* v. *Simpson*, 197 Md. 282, 76 A.2d 332 (1950); *Hammond* v. *Lancaster*, 194

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[3] In the *Elfbrandt* case, the Arizona loyalty oath was held invalid because of its indefiniteness, i.e., its failure to require specific intent to subscribe to the unlawful ends of a subversive organization by one who has become a member thereof. The relationship between First and Fourteenth Amendment rights, on the one hand, and the due process requirement of definiteness, on the other, is demonstrated by the following extracts from the Court's opinion:

"This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the States through the Fourteenth Amendment. (• • • citing.)

• • • •

"'A statute touching those protected rights must be narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state.' Cantwell v. Connecticut, 310 U. S. 296, 311 • • • Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' • • •

"A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. • • • •" *Id.* at pp. 18-19.

Md. 462, 71 A.2d 474 (1950); and *Hammond* v. *Frankfeld*, 194 Md. 487, 71 A.2d 482 (1950). One of the parties in the *Shub* case sought further review in the Supreme Court of the United States, *Gerende* v. *Bd. of Supervisors of Elections*, 341 U. S. 56 (1951). Technically, the oath found to be valid in the *Gerende* case was the oath required of candidates for election by § 15 of Article 85A, while the oath to which plaintiff objects is the oath required by §§ 11 and 13 of Article 85A of state employees and appointed officers, but, since the oaths are identical in both situations, what the Supreme Court said in the *Gerende* case is determinative here. The Court affirmed the decision of the Maryland Court of Appeals in *Shub* v. *Simpson, supra*, saying:

> "We read this decision to hold that to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt. —— Md. ——, at ——, 76 A.2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is affirmed." *Id.* at 56-57.

Thus, the Supreme Court in *Gerende* specifically approved of an oath that one is "not a person who is engaged in one way or another in the attempt to overthrow the government

by force or violence," and that "he is not knowingly a member of an organization engaged in such an attempt." The oath in the case at bar is precisely in the form upheld by the Supreme Court, except that it eliminates the part of the oath that he who makes it also certifies that he is "not knowingly a member of an organization engaged in such an attempt [overthrow of the government by force or violence]." In argument we were told that the latter certification was eliminated from the form of oath at the instance of the Attorney General on May 3, 1966, following the decision in *Elfbrandt* v. *Russell, supra* [decided April 18, 1966]. In the light of this flat holding in *Gerende,* we need only determine whether *Gerende* has been subsequently overruled or modified to decide plaintiff's first contention. Plaintiff asserts that *Gerende's* authority has been impaired by *Baggett* v. *Bullitt* and *Elfbrandt* v. *Russell, supra.*

In *Baggett* v. *Bullitt, supra,* loyalty oaths of the State of Washington, one applicable to teachers and the other applicable to all state employees, including teachers, were held invalid for vagueness. The oath required of all state employees, including teachers, is the significant oath for the case at bar. It required employees to swear that they were not a "subversive person" which was defined in terms identical to those under Article 85A § 1 to include one who "advocates, abets, advises or teaches by any means" another to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration of the constitutional form of government by revolution, force or violence. Insofar as a "subversive person" was one who was a member of a "subversive organi-

zation," the Washington definition included a limitation, absent in the Maryland definition, that membership be knowing. The Supreme Court held the "advocates, abets, etc." language invalid because it was lacking in terms susceptible of objective measurement and failed to inform what the state commanded or forbade.[4]

The *Baggett* case is clear authority that if Maryland required an oath in the precise language of the Maryland Subversive Activities Act of 1949, *supra,* such an oath would be invalid. The fact is, however, that the oath sought to be exacted from the plaintiff in the case at bar is less than that condemned in *Baggett* and, indeed, less than that approved in *Gerende.* While the dissenters in *Baggett* v. *Bullitt* expressed the view that *Gerende* had been overruled by the decision in *Baggett,* explaining the reasons for this conclusion in a footnote,[5] the majority answered by foot-

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[4] *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961), was relied on to support this result. There Florida required state employees, including teachers, to make oath that they, *inter alia,* had not lent "aid, support, advice, counsel or influence to the Communist Party." 368 U. S. at p. 279. The oath was held invalid because lacking in terms susceptible of objective measurement. In so deciding, the Court commented on the absence of language proscribing "advocacy of violent overthrow of state or federal government" and "membership or affiliation with the Communist Party, past or present." 368 U. S. at p. 286.

[5] "It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in Gerende, but a review of the record in that case conclusively demonstrates to the contrary. Further, while the Gerende opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague." *Id.* at p. 382.

note that *Gerende* was still good law.[6] In view of the statement by the majority we cannot read *Baggett* v. *Bullitt* as adversely affecting the portion of the holding in *Gerende* which approved the oath sought to be required of the plaintiff.

In *Elfbrandt* v. *Russell, supra,* the Arizona loyalty oath was held invalid. The language of the oath[7] as such did not appear to violate any constitutional fiat, but the legislature put a gloss on the oath by subjecting to a prosecution

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[6] "The contention that the Court found no constitutional difficulties with identical definitions of subversive person and subversive organizations in Gerende v. Board of Supervisors, 341 US 56, 95 L. ed. 745, 71 S. Ct. 565, is without merit. It was forcefully argued in Gerende that candidates for state office in Maryland were required to take an oath incorporating a section of the Maryland statutes defining subversive person and organization in the identical terms challenged herein. But the Court rejected this interpretation of Maryland law and did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes. Instead it made very clear that the judgment below was affirmed solely on the basis that the actual oath to be imposed under Maryland law requires one to swear that he is not a person who is engaged 'in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt." *Id.*, at 56-57, 95 L. ed. at 746 (emphasis in original). The Court said, "At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is Affirmed. Id. at 57, 95 L. ed. at 746." *Id.* at p. 368.

[7] "I, (type or print name), do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so I do affirm)."

for perjury and for discharge from public office anyone who took the oath and who "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations," or "any other organization," having for one of its purposes the overthrow of the government of Arizona by force or violence, where the employee had knowledge of the unlawful purpose. The failure of the statutory gloss to require further that the prosecution and expulsion be conditioned upon a showing that the employee was an active member *with the specific intent of assisting in achieving the unlawful ends of an organization which had as one of its purposes the violent overthrow of the government* rendered the gloss invalid.

The decision is, of course, ample justification for the Attorney General of Maryland to have eliminated the portion of the Maryland oath approved in *Gerende* that a person is not knowingly a member of a subversive organization, and to that extent overruled the decision in *Gerende*. The majority opinion makes no mention of *Gerende*, but we cannot read *Elfbrandt* as overruling *Gerende* to any greater extent, notwithstanding the inability of the dissenters to square the holding with the holding in *Gerende* and other cases. In short, in both of the decisions rendered after *Gerende* which have been pressed on us by plaintiff, we cannot find that the portion of the holding in *Gerende* which permits an oath that a person is not engaged in one way or another in the attempt to overthrow the government by force or violence has been impaired.

Plaintiff argues that "in one way or another" is a phrase unconstitutionally vague, while defendants argue that "in

one way or another" means "any way" and is linked to the word "attempt," so as to express the concept of specific intent, coupled with an overt act, to overthrow the government by force or violence. We need not choose between these arguments. It suffices to say that the phrase "in one way or another" was specifically approved in *Gerende;* we cannot find that it has been overruled; and it is our duty to apply the rules laid down by the Supreme Court and not to anticipate its possible future decisions.

Plaintiff also argues that the oath sought to be exacted from him is not limited to the text stated in the opinion but, rather, extends to the full oath purportedly required by Article 85A. Alternatively, plaintiff argues that the Attorney General of Maryland is without authority to require only a portion of the oath required by Article 85A, but not all. The first portion of the argument rests upon the assertion that, in the certificate plaintiff was asked to execute, the reference to "Art. 85A, paragraph 13, Annotated Code of Maryland 1957" after the phrase "Required by law" means that the certification following, which, on its face, is limited to engaging in one way or another in the attempt to overthrow the government by force or violence, embodies aspects of the oath prescribed by statute which are clearly invalid under the Supreme Court decisions. We are not persuaded. The other portion of the argument rests in part on *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), which is cited as indicating that only a state court of the State of Maryland may properly determine whether the full oath prescribed by Article 85A can be severed into its valid and invalid provisions, and that it is our duty to enjoin the oath in its entirety until a state

court renders an appropriate judgment. This argument overlooks § 18 of Article 85A,[8] as clear an expression of severability as could be found. Moreover, as the chief legal officer of the State of Maryland, sworn to uphold the Constitution of the United States, as well as the Constitution and laws of the State of Maryland, Md. Constitution, Article I, § 6, the Attorney General acted properly within the scope of his authority in advising that those portions of the oath prescribed by Article 85A repugnant to decided cases of the Supreme Court of the United States should not be required of state employees, even in the absence of a specific court decree. We do not read the *Dombrowski* case as proscribing this conduct.

We consider next plaintiff's argument that the oath is a bill of attainder and conclude that this contention is without merit. Loyalty oaths, as conditions precedent for public employment, if otherwise valid, are not invalid as bills of attainder. *Garner* v. *Board of Public Works,* 341 U. S. 716, 722 (1951), held an oath of non-advocacy of violent overthrow of government required of municipal employees not punishment and hence not a bill of attainder. Even *Baggett* v. *Bullitt, supra,* which condemned a loyalty oath as unconstitutionally vague, recognized the right of a state "* * * to take proper measures safeguarding the public service from disloyal conduct" (p. 379). See also,

[8] "18. Severability.

"If any provision, phrase, or clause of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions, phrases or clauses or applications of this article which can be given effect without the invalid provision, phrase, or clause or application, and to this end the provisions, phrases and clauses of this article are declared to be severable."

Concurring Opinion of Sobeloff, Circuit Judge

American Communications Ass'n. v. *Douds,* 339 U. S. 382 (1950); *Adler* v. *Board of Education,* 342 U. S. 485 (1952); and *Keyishian* v. *Board of Regents,* —— F. S. —— (W.D. N.Y. 1966), prob. jur. noted, 384 U. S. 998 (1966). *Speicer* v. *Randall,* 357 U. S. 513 (1958), is not to the contrary as the discussion of that case in *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 53-56 (1961), demonstrates.

Under existing law, we do not find the oath tendered to plaintiff invalid. We conclude that the complaint should be dismissed. The Clerk will enter an order to that effect.

(see separate concurrence)
United States Circuit Judge

HARRISON L. WINTER
United States Circuit Judge

ROSZEL C. THOMSEN
Chief Judge,
United States District Court
for the District of Maryland

SOBELOFF, *Circuit Judge,* concurring:

In joining my brethren in the disposition of this case I wish to add a brief statement of my reasons.

Whether the ritual of an oath or affirmation of loyalty, with or without sanctions for perjury, is a wise or effective means to the unquestionably legitimate end of protecting the state against subversion is not the issue before us. The question is the legality of the particular requirement demanded of the plaintiff, not its desirability.

Concurring Opinion of Sobeloff, Circuit Judge

I am inclined to agree with the plaintiff that the prescribed oath or statement is not to be judged in isolation, but in conjunction with the statute, for in the absence of a statute, there would be no authority for demanding any statement "under penalty of perjury." If it were not for *Gerende* v. *Board of Supervisors,* 341 U. S. 56 (1951), I would not lightly dismiss the plaintiff's argument that the reference to Article 85a, with its language about "subversive persons" and "subversive organizations," has a material bearing on the question before us, even though the oath itself does not expressly embody these terms. But the question comes to us freighted with a history, and the role of the statute in respect to the oath has been authoritatively interpreted.

In *Gerende* the Court upheld an oath which was in terms more comprehensive than the one before us. The Court embraced what it regarded as a restrictive interpretation of the Ober Law by the Maryland Court of Appeals, and upon that premise, and upon the condition that the Attorney General would advise the state authorities to accept as sufficient an affidavit in the narrow terms stipulated by the court, sustained the statute and the affidavit pursuant thereto. Whatever we might otherwise have thought, the Supreme Court has authoritatively decided that the broader language of the statute, which concededly would make it invalid, see *Baggett* v. *Bullitt,* 377 U. S. 360 (1964), is not controlling, but the less comprehensive language of the oath, as directed by the Attorney General, governs.

The plaintiff maintains first that the Supreme Court was mistaken in its analysis of the decision of the Maryland Court of Appeals in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d

332 (1950), and he further points to the logic employed in the later holdings in *Baggett* v. *Bullitt, supra,* and *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966), in support of his thesis that the Court must sooner or later disavow *Gerende.*

I acknowledge the force of the plaintiff's arguments as to the doubts concerning the present status of *Gerende* created by the recent decisions of the Supreme Court.[1] It may well be that on renewed consideration the Supreme Court would today hold the statute and the oath, even as recently further modified by the Attorney General, too vague to meet constitutional standards. However, it is one thing for a lower court to project an estimate of the future course of Supreme Court decisions on a point not theretofore specifically ruled upon; it is quite another to assume that an earlier decision of the Supreme Court on the very question now pending before the inferior tribunal has been overruled *sub silentio.* Judicial discipline requires that such assumptions be not too freely made, especially when the Supreme Court seems to have been careful to avoid an outright overruling. If *Gerende* is ripe for final dispatch, the task is for the Supreme Court, not a subordinate court.

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[1] Keyishian v. Board of Regents, —— F. Supp. —— (W. D. N. Y. Jan. 5, 1966), prob. juris. noted, 384 U. S. 998 (1966), decided prior to the Supreme Court's decision in *Elfbrandt,* may be distinguishable from the case at bar. There is no New York equivalent to the "loyalty pledge" subject to penalties for perjury, that is before us today. Furthermore, as the three-judge district court emphasized, New York State, in requiring of a prospective employee the assurance that he has complied with the laws under attack in *Keyishian,* affords the applicant an opportunity to be heard, should he be in doubt as to the coverage of the statutes.

Concurring Opinion of Sobeloff, Circuit Judge

Thus, despite the doubts engendered by the course of subsequent adjudications, I think the contentions made by the plaintiff here are more properly addressed to the Supreme Court. I am obliged, therefore, to join in today's order of dismissal rather than anticipate the abandonment of *Gerende*.

SIMON E. SOBELOFF
U. S. Circuit Judge

Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

[SAME TITLE]

Defendants' motion to dismiss having come on for hearing, briefs having been filed, argument having been heard, and the matter considered, it is, this eighth day of September, 1966, by the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND,

ORDERED, that defendants' motion to dismiss be, and it is hereby, granted, and said complaint is dismissed, with costs to defendants.

SIMON E. SOBELOFF
United States Circuit Judge

HARRISON L. WINTER
United States Circuit Judge

ROSZEL C. THOMSEN
Chief Judge
United States District Court
for the District of Maryland

Maryland Subversive Activities Act of 1949

Article 85A

ANNOTATED CODE OF MARYLAND (1957)
SEDITION AND SUBVERSIVE ACTIVITIES

§ 1. *Definitions.*

For the purposes of this article:

"Organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence.

"Foreign subversive organization" means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of, the United States, or of the

State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means.

"Foreign government" means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization. (An. Code, 1951, § 1; 1949, ch. 86, § 1.)

SEDITION

§ 2. *Unlawful acts.*

It shall be a felony for any person knowingly and wilfully to:

(a) Commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or

(b) Advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the State of Maryland or of any political subdivision of either of them; or

(c) Conspire with one or more persons to commit any such act; or

(d) Assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization; or

(e) Destroy any books, records or files, or secrete any funds in this State of a subversive organization or a foreign subversive organization, knowing said organization to be such.

Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of this section shall be fined not more than twenty thousand dollars, ($20,000), or imprisoned for not more than twenty (20) years, or both, at the discretion of the court. (An. Code, 1951, § 2; 1949, ch. 86, § 2.)

Maryland Subversive Activities Act of 1949

§ 3. *Membership in subversive organization.*

It shall be a felony for any person after June 1, 1949 to become, or after September 1, 1949 to remain a member of a subversive organization or a foreign subversive organization knowing said organization to be a subversive organization or foreign subversive organization. Any person who shall be convicted by a court of competent jurisdiction of violating this section shall be fined not more than five thousand dollars ($5,000), or imprisoned for not more than five (5) years, or both, at the discretion of the court. (An. Code, 1951, § 3; 1949, ch. 86, § 3.)

§ 4. *Effect of conviction.*

Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of §§ 2 and 3 of this article, in addition to all other penalties therein provided, shall from the date of such conviction be barred from:

(a) Holding any office, elective or appointive, or any other position of profit or trust in or employment by the government of the State of Maryland or of any agency thereof or of any county, municipal corporation or other political subdivision of said State;

(b) Filing or standing for election to any public office in the State of Maryland; or

(c) Voting in any election held in this State. (An. Code, 1951, § 4; 1949, ch. 86, § 4.)

§ 5. *Dissolution of organizations.*

It shall be unlawful for any subversive organization or foreign subversive organization to exist or function in the State of Maryland and any organization which by a court of competent jurisdiction is found to have violated the provisions of this section shall be dissolved, and if it be a corporation organized and existing under the laws of the State of Maryland a finding by a court of competent jurisdiction that it has violated the provisions of this section shall constitute legal cause for forfeiture of its charter and its charter shall be forfeited under the provisions of Article 23, §§ 104-108, inclusive, Annotated Code of Maryland [1939 Code] and all funds, books, records and files of every kind and all other property of any organization found to have violated the provisions of this section shall be seized by and for the State of Maryland, the funds to be deposited in the State treasury and the books, records, files and other property to be turned over to the Attorney General of Maryland. (An. Code, 1951, § 5; 1949, ch. 86, § 5.)

§ 6. *Special assistant attorney general—Appointment, salary and supervision.*

The Attorney General of Maryland is hereby authorized and directed to appoint an additional assistant to perform the duties of special assistant attorney general in charge of subversive activities whose annual salary shall be provided in the budget, and whose responsibility it shall be, under supervision of the Attorney General, to assemble, arrange and deliver to the State's attorney of any county or of Baltimore City, together with a list of necessary

witnesses, for presentation to the next grand jury to meet in said county or city, all information and evidence of matters within said county or Baltimore City which have come to his attention, relating in any manner to the acts prohibited by this article, and relating generally to the purposes, processes and activities of communism and any other or related subversive organizations, associations, groups or persons. (An. Code, 1951, § 6; 1949, ch. 86, § 6.)

§ 7. *Same—Assistance in collection of evidence and information.*

For the collection of any evidence and information referred to in this article, the Attorney General is hereby directed to call upon the Superintendent of State Police, the police commissioner of Baltimore City and other county and municipal police authorities of the State to furnish to the special assistant hereinbefore provided for, such assistance as may from time to time be required. Such police authorities are directed to furnish information and assistance as may be from time to time so requested. The special assistant attorney general herein provided for may testify before any grand jury as to matters referred to in this article as to which he may have information. (An. Code, 1951, § 7; 1949, ch. 86, § 7.)

§ 8. *Same—Records and reports.*

The Attorney General shall require the special assistant herein provided for, to maintain complete records of all information received by him and all matters handled by him under the requirements of this article. Such records as may reflect on the loyalty of any resident of this State,

shall not be made public or divulged to any person except with permission of the Attorney General to effectuate the purposes of this article. He shall further require the publication, printing and appropriate distribution of all reports of grand juries of this State made as hereinafter provided. The Attorney General shall include in his budget estimates, adequate moneys for the printing and distribution of the said reports, and for all other expenses of administering this article. To the extent that his time may not be required in his duties under this article, the special assistant attorney general shall be available for and perform such other duties as may be assigned to him by the Attorney General. - (An. Code, 1951, § 8; 1949, ch. 86, § 8.)

§ 9. *Duty of judges as to grand jury.*

The judge of the criminal court of each county and of Baltimore City, when in his discretion it appears appropriate, or when informed by the State's attorney that there is information or evidence of the character described in § 6 of this article to be considered by the grand jury, shall charge the grand jury to inquire into violations of this article for the purpose of proper action, and further to inquire generally into the purposes, processes and activities and any other matters affecting communism or any related or other subversive organizations, associations, groups or persons. Any grand jury charged by the court as provided herein shall not later than the conclusion of its term of service prepare a written report, separate from all other matters considered by said grand jury, of its findings upon the subjects placed before it under the requirements of this article, provided, however, such report shall not

charge any residents of this State with being disloyal unless they shall have been indicted under the provisions of this article or other provisions of the criminal law of this or some other jurisdiction. (An. Code, 1951, § 9; 1949, ch. 86, § 9.)

LOYALTY

§ 10. *Subversive person not eligible for governmental office.*

No subversive person, as defined in this article, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this State, or of any county, municipality, or other political subdivision of this State. (An. Code, 1951, § 10; 1949, ch. 86, § 10.)

§ 11. *Rules and regulations to determine loyalty—In general.*

Every person and every board, commission, council, department, court or other agency of the State of Maryland or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain before any person, including teachers and other employees of any public educational institution in this State, is appointed or employed, that he or she as the case may be, is not a subversive person, and that there are no reasonable grounds to believe such persons are subversive persons. In the event such reasonable grounds exist, he or she as the case may be shall not be appointed or em-

ployed. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. (An. Code, 1951, § 11; 1949, ch. 86, § 11.)

§ 12. *Same—Not applicable to laborers.*

The inquiries prescribed in § 11, other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in the classification of laborers in any case in which the employing authority shall in his or its discretion determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of persons as to whom there may be reasonable grounds to believe that they are subversive persons as defined in this article will not be dangerous to the health of the citizens or the security of the governments of the United States, the State of Maryland, or any political subdivision thereof. (An. Code, 1951, § 12; 1949, ch. 86, § 12.)

§ 13. *Statement of employees.*

Every person, who on June 1, 1949 shall be in the employ of the State of Maryland or of any political subdivision thereof, other than those now holding elective office shall be required on or before August 1, 1949, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article, namely, any person who

commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this article. Such statement shall be prepared and execution required by the State Commissioner of Personnel for all persons whose employment is subject to the provisions of Article 64A of the Annotated Code of Maryland and by the city service commission of Baltimore for all employees whose employment is subject to the provisions of §§ 142 to 156 of the Baltimore City Charter and by every person and every board, commission, council, department, court or other agency of the State of Maryland or any political subdivision thereof responsible for the supervision of other employees, for employees under its jurisdiction. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this article shall immediately be discharged. (An. Code, 1951, § 13; 1949, ch. 86, § 13; 1953, ch. 310.)

§ 14. *Discharge from office.*

Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this article, shall be cause for discharge from any appointive office or other position of profit or trust in the government of or

in the administration of the business of this State, or of any county, municipality or other political subdivision of this State, or any agency thereof. The State Commissioner of Personnel and the civil service commission of Baltimore shall, by appropriate rules or regulations, prescribe that persons charged with being subversive persons, as defined in this article, shall be accorded notice and opportunity to be heard, in accordance with the procedures prescribed by law for discharges for other reasons. Every person and every board, commission, council, department, or other agency of the State of Maryland or any political subdivision thereof having responsibility for the appointment, employment or supervision of public employees not covered by the classified service in this section referred to, shall establish rules or procedures similar to those required herein for classified services for a hearing for any person charged with being a subversive person, as defined in this article, after notice and opportunity to be heard. Every employing authority discharging any person pursuant to any provision of this article shall promptly report to the special assistant attorney general in charge of subversive activities the fact of and the circumstances surrounding such discharge. A person discharged under the provisions of this section shall have the right to appeal to the circuit court of the county or to the Baltimore City court wherein such person may reside for a determination by such court (with the aid of a jury, if the appellant so elects) as to whether or not the discharge appealed from was justified under the provisions of this article. The court shall speedily hear and determine such appeals, and from the judgment of the court, there shall be a further appeal to the

Court of Appeals of Maryland as in civil cases. (An. Code, 1951, § 14; 1949, ch. 86, § 14; 1953, ch. 310; 1962, ch. 36, § 54.)

§ 15. *Statements of candidates for office.*

No person shall become a candidate for election under the provisions of Article 33 of the Annotated Code of Maryland to any public office whatsoever in this State, unless he or she shall file with the certificate of nomination required by the foregoing Article 33, an affidavit that he or she is not a subversive person as defined in this article; provided that, in the case of certificates of nomination for President or Vice-President of the United States, the affidavit may be made on behalf of such candidates by those persons who file the certificate of nomination for such candidates. No certificate of nomination shall be received for filing by any board of supervisors of elections or by the Secretary of State of Maryland unless accompanied by the affidavit aforesaid, and there shall not be entered upon any ballot or voting machine at any election the name of any person who has failed or refused to make the affidavit aforesaid. (An. Code, 1951, § 15; 1949, ch. 86, § 15.)

§ 16. *Statement of private institution of learning before receiving public funds.*

Before any appropriation of public funds of any character shall be made by the State of Maryland to any private institution of learning, there shall be filed with the Governor, the President of the Senate and the Speaker of the House of Delegates, on behalf of said institution, a written report setting forth what procedures it has adopted to de-

termine whether it has reasonable grounds to believe that any subversive persons are in its employ, and what steps, if any, have been or are being taken to terminate such employment. In the absence of such a report no appropriation shall be included in the State budget or approved by the General Assembly. (An. Code, 1951, § 16; 1949, ch. 86, § 16.)

§ 17. *False statements constitute perjury.*

Every written statement made pursuant to this article by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this article, or (c) under oath in any hearing conducted by any agency of the State, or of any of its political subdivisions, pursuant to this article, or (d) in any written statement by an applicant for appointment or employment or by an employee in any State aid or private institution of learning in this State, intended to determine whether or not such applicant or employee is a subversive person as defined in this article, which statement contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury prescribed in Article 27, § 439 of the Annotated Code. (An. Code, 1951, § 17; 1949, ch. 86, § 17.)

§ 18. *Severability.*

If any provision, phrase, or clause of this article or the application thereof to any person or circumstance is held

invalid, such invalidity shall not affect other provisions, phrases, or clauses or applications of this article which can be given effect without the invalid provision, phrase, or clause or application, and to this end the provisions, phrases and clauses of this article are declared to be severable. (An. Code, 1951, § 18; 1949, ch. 86, § 18.)

§ 19. *Short title.*

This article may be cited as the Subversive Activities Act of 1949. (An. Code, 1951, § 19; 1949, ch. 86, § 19.)

CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT

Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)

"I, ..., do hereby
(Print Name—including middle initial)
certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

"I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

Date .....

Signature .....
(Name—including middle initial)

Press Release

May 3, 1966

THOMAS B. FINAN, *Attorney General*

I had the privilege today to meet with the Honorable Frank B. Ober, Chairman of the Commission which drafted the original loyalty oath act which bears his name. My office has prepared a new form of loyalty pledge which both, Mr. Ober and I, feel complies with the most recent decision of the United States Supreme Court in the case of *Elfbrandt* v. *Russell,* which pertained to the loyalty oath in use in the State of Arizona.

Heretofore, this office had prescribed language for use in the oath which complied with the opinion of the Court of Appeals of Maryland in *Gerende* v. *Board of Supervisors of Elections* and which was sustained by an unanimous decision of the United States Supreme Court (1951).

The new form of the oath will contain a slight modification and will read as follows:

> "I, ... do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

I think, and Mr. Ober agrees, that this pledge strikes at the methods and means used by subversive groups who, from time to time, have demonstrated their efforts and intent to destroy our Government by force or violence.

Office-Supreme Court, U.S.
FILED
DEC 5 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~754~~ 25

HOWARD JOSEPH WHITEHILL,
Appellant,

v.

WILSON ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND,
AND
BOARD OF REGENTS OF THE
UNIVERSITY OF MARYLAND,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

ROBERT C. MURPHY,
Attorney General of Maryland,

LORING E. HAWES,
Assistant Attorney General
of Maryland,

JULIUS A. ROMANO,
Assistant Attorney General
of Maryland,
1200 One Charles Center,
Baltimore, Maryland 21201
For Appellees.

The Daily Record Co., Baltimore, Md. 21203

INDEX

Table of Contents

	PAGE
Statute, Rules and Regulations Involved	1
Questions Presented	2
Statement	3
Argument:	
The questions are unsubstantial and unworthy of further review because the questions have been fully adjudicated in prior decisions of this Court	4
A. *Gerende* is controlling under the facts of this case, and there is no substantial basis for this Court's consideration of overruling *Gerende*	5
B. Maryland's Certification of Applicant for Public Employment does not violate due process of law	7
C. The "Certification of Applicant for Public Employment" required by the State of Mary-Maryland does not violate Appellant's constitutional guarantees of freedom of speech, expression, belief or association	11
D. The "Certification of Applicant for Public Employment required by the State of Maryland does not constitute a prohibited Bill of Attainder in violation of the United States Constitution	16
Conclusion	18
Appendix—Letter of Attorney General Thomas B. Finan to Gov. J. Millard Tawes	1

TABLE OF CITATIONS

Cases

	PAGE
Adler v. Board of Education of New York, 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952)	7, 8, 12
American Communications Association, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950)	12, 17
Baggett v. Bullitt, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964)	7, 8, 9, 10, 12
Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961)	7, 8
Cummings v. Missouri, 4 Wall 277, 18 L. 356 (1867)	17
Dennis v. United States, 34 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951)	9, 10
Elfbrandt v. Russell, 384 U.S. 11, 86 S. Ct. ....., 16 L. Ed. 2d 321 (1966)	7, 10, 11
Ex Parte Garland, 4 Wall 333, 18 L. 366 (1867)	17
Garner v. Board of Public Works, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951)	12, 13, 16
Gerende v. Baltimore City Board of Supervisors of Elections, 341 U.S. 56, 71 S. Ct. 565, 95 L. Ed. 745, reh. den. 341 U.S. 923, 71 S. Ct. 741, 95 L. Ed. 1356 (1951)	1, 4, 5, 6, 7, 9, 10, 11, 12, 13
Keyishian v. Board of Regents, 255 F. Supp. 981 (W.D. N.Y. Jan. 1966)	17
Konigsberg v. State Bar of California, 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961)	14, 17
Shub v. Simpson, 196 Md. 177, 76 A. 2d 332, appeal dismissed 340 U.S. 881, 71 S. Ct. 198, 95 L. Ed. 640 (1950)	4, 6, 17
Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958)	13, 14
United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947)	12
West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)	15, 16

Statutes and Rules

	PAGE
Annotated Code of Maryland (1957 Edition):	
Maryland Subversive Activities Act of 1949—	
Article 85A	1, 2, 4
Section 1	9
Section 13	9
Section 15	5
Revised Rules of the Supreme Court of the United States:	
Rule 16	1
Constitution of the United States:	
Article 1, Section 10	2
First Amendment	2
Fourteenth Amendment	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 754

HOWARD JOSEPH WHITEHILL,
Appellant,

v.

WILSON ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND,
AND
BOARD OF REGENTS OF THE
UNIVERSITY OF MARYLAND,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

STATUTE, RULES AND REGULATIONS INVOLVED

The provisions of the law involved in this case are the Maryland Subversive Activities Act of 1949, Article 85A, Annotated Code of Maryland (1957 Edition) and "Certification of Applicant for Public Employment", promulgated thereunder, which said statute and certification are fully set forth in the Appendix to Appellant's Brief.

QUESTIONS PRESENTED

1. Is *Gerende v. Board of Supervisors of Elections*, 341 U.S. 56 (1951), controlling under the facts of this case, or should *Gerende* be overruled as a basis for upholding the validity of Maryland's "Certification of Applicant for Public Employment", which certification Appellant refused to execute in the form required by Maryland law as a pre-condition of public employment?

2. Is Maryland's "Certification of Applicant for Public Employment" unconstitutionally vague and indefinite, and therefore in violation of due process of law?

3. Does the severability clause in the Maryland Subversive Activities Act of 1949 permit Maryland's requirement of a "Certificate of Applicant for Public Employment" to be limited in wording so as to conform to constitutional requirements announced by this Court in recent decisions?

4. Does Maryland's loyalty "Certification", which is required of all public employees and applicants for public employment, unconstitutionally infringe the freedoms of expression, belief, association and academic freedom in violation of the First and Fourteenth Amendments to the United States Constitution?

5. Does Maryland's requirement that applicants for public employment execute the "Certification of Applicant for Public Employment" infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or subversiveness and by shifting the burden of proof of loyalty onto applicants, in violation of due process of law?

6. Does Maryland's "Certification of Applicant for Public Employment" constitute a bill of attainder in violation of Article 1, Section 10 of the United States Constitution?

STATEMENT

This is a direct appeal from the final judgment and order entered on September 8, 1966 by the United States District Court for the District of Maryland, specially constituted as a Three Judge Court, dismissing Appellant's complaint which sought to enjoin the Appellees from requiring the Appellant to execute a "Certification of Applicant for Public Employment", as a condition precedent to employment by the Appellees. The Appellant, a university lecturer in creative writing, applied to the University of Maryland for a position as visiting lecturer in English during the academic year of 1966-67. During contract negotiations, Appellant made it clear that he would refuse to execute a so-called loyalty pledge required by the University entitled "Certification of Applicant for Public Employment". The University thereupon declined his appointment on the basis of his refusal to sign the certification as a condition precedent to his appointment.

The "Certification of Applicant for Public Employment" which the Appellant refused to sign reads as follows:

> "I, ... do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 Edition)."

No oath or affirmation is required. The Maryland certification is not strictly a loyalty oath, does not call for an oath of allegiance and merely requires certification that the applicant is not engaged in an attempt to overthrow

the Government. The present form of the oath was prescribed by the Attorney General of Maryland as being the maximum certification required by the Maryland Subversive Activities Act of 1949, Article 85A, Annotated Code of Maryland, 1957 Edition, in the light of recent decisions of this Court. The latest revision of the Maryland loyalty pledge was officially prescribed by the Attorney General in a letter dated May 13, 1966 to Governor J. Millard Tawes, a copy of which letter is included in the Appendix hereto.

ARGUMENT

THE QUESTIONS ARE UNSUBSTANTIAL AND UNWORTHY OF FURTHER REVIEW BECAUSE THE QUESTIONS HAVE BEEN FULLY ADJUDICATED IN PRIOR DECISIONS OF THIS COURT.

General Considerations

Throughout his presentation to the Court below and in his appeal to this Court, Appellant has consistently sought broadside review and condemnation of the Maryland Subversive Activities Act of 1949, (hereinafter referred to as "the Act"), in complete disregard of the limited requirements placed upon him by that Act as the same had been interpreted by the Maryland Attorney General, the Maryland Court of Appeals (*Shub v. Simpson*, 196 Md. 177, 76 A. 2d 332) and by this Court (*Gerende v. Board of Supervisors of Elections, supra*). Even in his "Questions Presented" the Appellant has sought to obtain review by and separate rulings from this Court on the constitutionality of the Maryland Subversive Activities Act of 1949, absent the requirements of that Act applicable to the Appellant under the facts of this case. Unenforced portions of a statute containing broad severability provisions do not constitute a justiciable controversy worthy of the attention of this Court. Consequently, the "Questions Presented" of the Appellant have been restated above to state the

actual issues sought to be presented to this Court lest any member of this Court be confused by the manner in which the questions have been presented by the Appellant.

Further, if indeed *Gerende* is controlling, as the Court below has indicated is the case, none of the subsidiary issues presented by the Appellant need further elaboration.

A. *GERENDE* IS CONTROLLING UNDER THE FACTS OF THIS CASE, AND THERE IS NO SUBSTANTIAL BASIS FOR THIS COURT'S CONSIDERATION OF OVERRULING *GERENDE*.

In *Shub v. Simpson*, 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed*, 340 U.S. 881, the Act was attacked as unconstitutional on a number of grounds, including contentions that it abridged the fundamental rights of freedom of speech, press and assembly, that it was unconstitutionally vague and therefore violative of due process; that it was a bill of attainder and that it attempted to establish guilt by association. In that case, a candidate for election to a municipal office had declined to execute the loyalty oath required by Section 15 of the Act, and, accordingly, his name was eliminated from the ballot. After noting the factual recitals in the preamble of the Act, and finding therein a sufficient basis of necessity for the passage of the Act, the Court held the Act constitutional, stating, *inter alia*, as follows (at page 192):

> "The purpose of Section 11 of Article 15 of the Constitution, and of Chapter 86 of the Acts of 1949, is the same and they are to be construed together to effect that purpose. That is to prevent infiltration in our state, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence*. We construe the affidavit required by Sec. 15 with respect to those desiring to become candidates for public office as a means of preventing such infiltration at its initial

stage, thereby preventing confusion among the electors and that it is, in no sense, an additional oath of office."

The court additionally noted (page 192):

"An act passed by the Legislature for such a purpose comes to us 'encased in the armor wrought by prior legislative deliberation.' *Bridges v. California,* 314 U.S. 252, at page 261, 62 S. Ct. 190 at page 193, 86 L. Ed. at page 202, approved and quoted in *American Communications Association v. Douds,* 339 U.S. 382, 401, 70 S. Ct. 674, 685, 94 L. Ed. 925, 945, to which is added by Chief Justice Vinson, who delivered the opinion in the latter case, the words: 'The deference due legislative determination of the need for restriction upon particular forms of conduct has found repeated expressions in this Court's opinions.' The purpose of Chapter 86, as shown by its title and throughout its provisions, is not to restrict freedom of speech or thought, nor does it do so."

The judgment of the Court of Appeals of Maryland in *Shub,* sustaining the validity of the Maryland loyalty oath, was *unanimously* affirmed by the Supreme Court of the United States in *Gerende v. Board of Supervisors of Elections, supra,* as follows:

"We read this decision to hold that to obtain a place on the Maryland ballot a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances, and with this understanding the judgment of the Maryland Court of Appeals is affirmed."

This Court denied a rehearing in *Gerende*, 341 U.S. 923 (1951). *Gerende* has consistently received the approval of this Court. See *Cramp v. State Board of Public Instruction*, 368 U.S. 278 (1961); *Adler v. Board of Education*, 342 U.S. 485 (1952). With respect to the Maryland loyalty certification under consideration here, *Gerende* has not been overruled, either expressly or by implication. Appellant's contention that *Gerende* is no longer the law is predicated primarily upon the cases of *Baggett v. Bullitt*, 377 U.S. 360 (1964), and *Elfbrandt v. Russell*, 384 U.S. 11 (1966). Neither of these cases involved a loyalty certification as restricted in its wording as that required by Maryland.

B. MARYLAND'S CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT DOES NOT VIOLATE DUE PROCESS OF LAW.

This Court need look no further than *Gerende* to conclude that the Maryland Certification in question is not unconstitutionally vague, since it is for all purposes here material the precise oath upheld as constitutional in that case. In this connection, it is to be noted that the Supreme Court has since *Gerende* alluded to that case as an example of a valid loyalty certification. See *Cramp v. State Board of Public Instruction, supra; Adler v. Board of Education, supra.*

In recent years, the test for determining whether a so-called loyalty oath is unconstitutionally vague has turned on whether the oath is lacking in "terms susceptible of objective measurement." This test originated in the *Cramp* case, supra, and was restated in *Baggett, supra,* where, at page 367, the Supreme Court held that the 1955 Washington oath "suffers from similar infirmities" as the Florida oath invalidated in *Cramp*. The Florida oath required a teacher to swear that he had never lent his "aid, advice, counsel or influence to the Communist Party." In finding

that the oath was lacking in terms susceptible of objective measurement, the Court, after pointing out certain defects of vagueness in the oath, remarked most significantly that the oath "says nothing of advocacy of violent overthrow of State or Federal Government". 368 U.S. at 286. Thus, the Court clearly inferred that had the oath been based on advocacy of violent overthrow of the Government, it would have met the test of "terms susceptible of objective measurement." That the Maryland loyalty certification is, in fact, based on such terms, is clearly beyond doubt, viz:

> "I, ..., am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence."

Hence, the Florida oath was voided on vagueness grounds because it did not utilize the specific terms contained in the Maryland certification, which clearly meets the Supreme Court's vagueness test outlined in *Cramp* and *Baggett*.

Further proof that the Maryland loyalty certification in issue is not vague is readily found in *Adler v. Board of Education, supra,* where New York's Feinberg Law establishing criteria for elimination of subversives from the public schools, was attacked as being unconstitutionally vague. The definition of a "subversive organization" there in question was one that "teaches and advocates the overthrow of the government by force or violence." 342 U.S. at 496. The Supreme Court upheld the definition as not vague, stating that the word "subversive" is one which sets forth a "very definite meaning." 342 U.S. at 496. Thus, once again the Court articulated that such a definition, dealing with overthrow of government by force or violence, is in no sense vague.

Appellant contends that since the definition of a "subversive person" in *Baggett* was declared unconstitutionally vague, and that since this definition is similar to the one contained in Sections 1 and 13 of the Ober Act, the present Maryland loyalty certification is likewise invalid. Nowhere in the present loyalty certification, however, is the word "subversive" mentioned, nor is that certification couched in the language of the statement provided for in Section 13.

It is important to note that Appellant has not been asked to certify that he is not a "subversive person", as defined in the Maryland Act, and whether he falls within the terms of Section 13, or whether the definition in question is any longer valid, is simply not relevant to the present case. Appellant has no standing to challenge any certification other than that which he declined to execute, since only that certification is necessarily involved in this litigation. See *Gerende, supra.*

As heretofore indicated, the Supreme Court in *Gerende* upheld the Maryland loyalty certification presently in use, expressly finding the same in no wise vague, on the basis that it had been interpreted by the highest court of the State to require only an oath that the subscriber is not a person who is engaged in one way or another in the attempt to overthrow the government by force or violence. This judicial construction of Maryland's loyalty certification requirement is determinative of its breadth and scope and establishes its meaning and application. The significance of dealing with interpretation, rather than mere literal language, was manifested in *Baggett,* where it was contended that the definition of "subversive person", which was there voided, was, in fact, virtually the same as the definitions upheld in *Gerende,* and also in *Dennis v. United States,* 341 U.S. 494 (1951), where Section 2 of the Smith

Act was challenged as vague. The *Baggett* Court pointed out that *Gerende* rested on the Maryland Court of Appeals interpretation of the Maryland law which "did not pass upon or approve the definitions of subversive person and organization." 377 U.S. at 368, note 7. Likewise, the *Baggett* Court pointed out that in *Dennis* it was interpretation that saved the statute from the vice of unconstitutional vagueness; that is, since it was a federal statute, the Court could interpret and sustain the statute on the construction that the activity proscribed was "teaching and advocacy of action for the accomplishment of [overthrowing or destroying organized government] by language reasonably and ordinarily calculated to incite persons to such action * * * as speedily as circumstances would permit." 377 U.S. at 370. It is particularly to be observed that the Supreme Court was most cautious to point out in *Baggett* that the Smith Act is still valid because of the saving construction the Court gave it in *Dennis*.

Nor can Appellant find support in *Elfbrandt v. Russell, supra*, for the proposition that the Maryland loyalty certification is unconstitutionally vague. There, the Court voided an Arizona oath subjecting an individual to a perjury prosecution and discharge from public office if he took the oath and "knowingly and wilfully becomes or remains a member of the Communist Party * * * or any other organization having for one of its purposes the overthrow of the Government * * * or the employee had knowledge of the unlawful purpose." The *Elfbrandt* Court struck down the Arizona oath because there existed within its terms the "hazard of being prosecuted for knowing but guiltless behavior." 384 U.S. at page 16. The Court there clearly pointed out that the Arizona law failed to require a specific intent to further illegal ends; consequently, it rested on the doctrine of guilt by association and, thereby,

infringed on the freedom of political association. The Court succinctly stated:

> "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."

Consistent with the Supreme Court's decision in *Elfbrandt*, the phrase "and that I am not knowingly a member of an organization engaged in such an attempt" (formerly used as a part of the Maryland certification, and included within the certification's provisions in *Gerende*, was removed from the Maryland loyalty certification. The result is, therefore, that the defect in the Arizona oath of proscribing mere knowing membership, without requiring specific intent, has been eliminated from the Maryland loyalty certification. There is no guilt by association problem because there is no association mentioned from which any guilt may be inferred. Instead, the present Maryland loyalty certification clearly rests solely on a specific attempt to violently overthrow the Government, by force or violence. No association is specified; no knowing membership is punished.

C. THE "CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT" REQUIRED BY THE STATE OF MARYLAND DOES NOT VIOLATE APPELLANT'S CONSTITUTIONAL GUARANTEES OF FREEDOM OF SPEECH, EXPRESSION, BELIEF OR ASSOCIATION.

It is, of course, well settled that the constitutional right of liberty of speech is subject to reasonable regulations as are necessary to promote and preserve the public welfare and safety. It is equally well settled that the State may require, as a condition of employment with it, that individuals seeking such employment execute a valid loyalty

certification, such requirement being a reasonable regulation to protect the State service, to establish an employment qualification of loyalty to the State, and to the United States. *Garner v. Board of Public Works*, 341 U.S. 716 (1951); *Gerende v. Board of Supervisors of Elections, supra; American Communications Association v. Douds*, 339 U.S. 382. More specifically, as stated in Garner, at page 720:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low position in private industry and are not less relevant in public employment. . . ."

See also *Adler v. Board of Education, supra*, and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), upholding the constitutionality of the congressional enactment restricting political activity of Federal Civil Service employees.

The right of the State to require a proper certification of loyalty has been expressly upheld even in those cases where particular oaths have been declared unconstitutionally vague. See *Baggett v. Bullitt, supra*, at page 379, wherein it is noted:

> "As in *Cramp v. Board of Public Instruction, supra*, we do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct."

As even more succinctly stated by Mr. Justice Frankfurter in *Garner*, in his separate concurring opinion, at page 725:

> "... No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence ...."

Appellant, as an applicant for public employment in Maryland, declined to subscribe to the statement that "I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence".

Having determined that this certification is not unconstitutionally vague, it can hardly be denied that it constitutes a valid standard of qualification and eligibility for public employment by seeking, as it does, to prevent employment of persons engaged in an attempt to overthrow the government by force or violence.

The case of *Speiser v. Randall*, 357 U.S. 513 (1958) manifests the significance of this different purpose. There, a loyalty oath was required as a condition for eligibility for a veteran's tax exemption. The Supreme Court struck down this provision on the ground that its enforcement would place the burden of proof of nonadvocacy of violent overthrow on the taxpayer and as such would violate due process. The Court was careful, however, to delineate the differences between the *Speiser* situation, where the oath was used to penalize people for holding certain ideas, and situations where, as here, a loyalty certification is required only as a condition for public employment. Referring to the *Garner*, *Gerende*, and *Douds* cases, *supra*, the Court said:

> "In these cases however there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. . . . The principal aim of those statutes was not to penalize

political beliefs but to deny positions to persons supposed to be dangerous because the position might be used to the detriment of the public." 357 U.S. at 527.

Likewise, the Court made manifest the distinctions on the burden of proof issue:

> "In the earlier cases . . . the loyalty oath once signed became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath he retained his position. The oath was not part of a device to shift to the office holder the burden of proving his right to retain his position. The signer, of course, could be prosecuted for perjury, but only in accordance with the strict procedural safeguards surrounding such criminal prosecutions. In the present case, however, it is clear that the declaration may be accepted on the basis of incompetent information or no information at all. It is only a step in a process throughout which the taxpayer must bear the burden of proof."

In *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961), the Court was careful to demonstrate that the *Speiser* principle was limited to where there was intent to penalize certain beliefs and to effectuate such attempt by placing the burden of proof of nonadvocacy of violent overthrow on the Plaintiff. There, the Court upheld California's right to deny admission to the practice of law to an individual who refused to answer the bar examining committee's questions pertaining to membership in the communist party. The Court said at page 54:

> "*Speiser* was explicitly limited so as not to reach cases where, as here, there is no showing of an attempt to penalize political beliefs."

The Court also found that the burden of proof had not been shifted to petitioner merely because he was required to

testify before the committee and to submit to discovery in order to become a member of the bar. 366 U.S. at 55.

Furthermore, the Maryland certification is no more constitutionally offensive than a requirement common to many job applications that the applicant state whether or not he has a venereal disease or a mental or nervous disorder.

That Appellant, should he seek public employment, be required to certify that he is not engaged in an attempt to overthrow his prospective employer, by force or violence, would hardly appear to violate anyone's religious freedom. It is not clear from the record just how the Maryland certification offends Appellant's religion or belief, and he has failed to allege any specific facts showing in what precise way his religious beliefs would be infringed by the requirement that he execute the Maryland Loyalty Certification. He only states that the requirement is offensive and insulting.

Appellant apparently relies on *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) to support his contention of violation of religious beliefs. In that case school children were required by State law to salute the flag. An objection was registered by a Jehovah's Witness on the ground that he considered the flag "an image" which he was forbidden by the Bible to pay homage. The Court found that the salute requirement was trivial to the welfare of the State and, consequently, that the infringement on freedom of religion was not there justified. In the present case, however, the purpose of the Maryland Loyalty Certification is far more crucial than merely compelling good citizenship — it is to safeguard the State from internal disorder. But even if the desired ends were not more substantial than in *Barnette*,

Appellant has here failed utterly to allege what precept, if any, of his Quaker religion has in fact been offended. The *Barnette* Plaintiffs believed in a biblical command not to pledge allegiance to the flag. No similar command of Appellant's religion is cited as being violated by the Loyalty Certification.

Appellant's challenge to the Maryland loyalty certification on the basis that it infringes his academic freedom is novel indeed. There is no such freedom protected by the United States Constitution, and even if there were, it is doubtful that the Appellant has standing to raise the issue inasmuch as he has initiated this litigation as a class action on behalf of public employees of the University of Maryland (or the State — it is not clear which), most of whom cannot claim special dispensation on the basis of so-called "academic freedom".

D. THE "CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT" REQUIRED BY THE STATE OF MARYLAND DOES NOT CONSTITUTE A PROHIBITED BILL OF ATTAINDER IN VIOLATION OF THE UNITED STATES CONSTITUTION.

The contention that loyalty certifications are prohibited Bills of Attainder is completely answered by the Supreme Court in *Garner v. Board of Public Works, supra.* In that case, the Court, after careful analysis, concluded that loyalty oaths, as a condition for public employment, were not Bills of Attainder. There, an oath of non-advocacy of violent overthrow of government, together with an affidavit regarding Communist Party affiliations, were required of municipal employees. In holding that such requirement did not constitute a Bill of Attainder, the Court said at page 722:

> "Punishment is a prerequisite for a bill of attainder," and, "We are unable to conclude that punishment is

imposed by a general regulation which merely provides standards of qualification and eligibility for employment."

The Court distinguished *Cummings v. Missouri*, 4 Wall 277 (1867) and *Ex Parte Garland*, 4 Wall 333 (1867), which had avoided certain oaths as Bills of Attainder. The Court found these cases inapplicable "when the Legislature establishes reasonable qualifications for a vocational pursuit * * *". 341 U.S. at 723. The principle being articulated was clear: the prohibition against Bills of Attainder does not mean that the Legislature cannot prescribe standards for public or professional employment. Consequently, an oath required in order to be a public employee does not impose a penalty without judicial trial. See also *Konigsberg v. State Bar of California, supra; American Communications Ass'n v. Douds, supra; Shub v. Simpson, supra; Keyishian v. Board of Regents*, 255 F. Supp. 981 (W.D. N.Y., Jan. 5, 1966) *prob. juris, noted*, 384 U.S. 998 (1966).

CONCLUSION

For the foregoing reasons, the Appellant has not presented to this Court any substantial constitutional questions not previously fully considered by this Court, has raised no novel issues worthy of this Court's consideration, and has not shown any significant deprivation of his individual rights protected by the Constitution. Therefore, the Appellees submit that the judgment of the Court below is correct and should be affirmed.

Respectfully submitted,

ROBERT C. MURPHY,
Attorney General of Maryland,

LORING E. HAWES,
Assistant Attorney General
of Maryland,

JULIUS A. ROMANO,
Assistant Attorney General
of Maryland,
1200 One Charles Center,
Baltimore, Maryland 21201

For Appellees.

December 5, 1966.

APPENDIX

State of Maryland
State Law Department
One Charles Center
Baltimore, Md. 21201

May 13, 1966

The Honorable J. Millard Tawes
Governor of the State of Maryland
State House
Annapolis, Maryland 21404

Dear Governor:

As you may know, on April 18, 1966, the Supreme Court of the United States, dividing 5-4, in *Elfbrandt v. Russell*, 34 L.W. 4347, struck down as unconstitutional the Arizona loyalty oath required of public employees of that State and its political subdivisions. The Arizona statute subjected to prosecution for perjury and discharge from public office anyone who took the oath and who "knowingly and willfully becomes or remains" a member of the Communist Party, or "any other organization" having for "one of its purposes" the violent overthrow of the State government, or any of its political subdivisions, where the employee had knowledge of the unlawful purpose.

The Supreme Court declared that:

> "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."

In light of the *Elfbrandt* decision, the Maryland Loyalty Pledge has been modified, by eliminating the words "and I am not knowingly a member of an organization engaged in such an attempt", to read as follows:

"I, ... do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

"I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

This office is advising the Secretary of State and the Commissioner of Personnel of the modified loyalty pledge devised by this office to meet the constitutional standards required by the decision in the Arizona case.

We are also advising the legal officers of all of Maryland's political subdivisions of the modification, with the suggestion that they recommend to their governing bodies that the County oath, where different, be made to conform to the State oath.

With kind personal regards, I remain

Sincerely,

THOMAS B. FINAN,
Attorney General.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 25

HOWARD JOSEPH WHITEHILL, *Appellant*,

v.

WILSON ELKINS, ET AL., *Appellees*.

On Appeal from the United States District Court for the District of Maryland

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE

BERNARD WOLFMAN
3400 Chestnut Street
Philadelphia, Pennsylvania

HERMAN I. ORENTLICHER
1785 Massachusetts Avenue, N.W.
Washington, D.C.
Attorneys for Amicus Curiae

Of Counsel:

ROBERT M. O'NEIL
Boalt Hall (School of Law)
Berkeley, California

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Interest of Amicus	1
Statement of Facts	3
Summary of Argument	7
Argument	8
I. The loyalty oath requirements of the Ober Law are properly before this Court and are clearly unconstitutional	8
A. This appeal directly challenges the constitutionality of the relevant provisions of the Ober Law	8
1. *Gerende* did not consider and approve the constitutionality of the oath certificate apart from the Ober Law	9
2. The constitutionality of the oath certificate cannot logically be judged apart from the underlying provisions of the statute	12
3. Separation of the oath from the Ober Law perpetuates the uncertainty and ambiguity surrounding the statute and its history	13
4. The promulgation of the certificate raises serious constitutional questions about the delegation of legislative authority	16
B. The loyalty oath provisions of the Ober Law clearly violate the First and Fourteenth Amendments	16
II. The terms of the oath certificate are unconstitutional even if the underlying statutory provisions are not in issue	17
A. The terms of the certificate are unconstitutionally vague	17

Page

B. Maryland must rely upon less restrictive means of serving the essential purposes of the oath 20

C. The certificate provides no procedure by which a nonsigner can demonstrate his fitness for public employment 20

Conclusion 24

TABLE OF AUTHORITIES

CASES:

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 9, 14, 16, 17, 19
Cramp v. *Board of Public Instruction*, 368 U.S. 278 (1961) 17, 18, 19
Dombrowski v. *Pfister*, 380 U.S. 479 (1965) 13
Elfbrandt v. *Russell*, 384 U.S. 11 (1966) 6, 13, 18
Gerende v. *Board of Supervisors*, 341 U.S. 56 (1951) 5, 6, 7, 8, 9, 10, 12, 14, 15
Heckler v. *Shepard*, 243 F.Supp. 841 (D. Idaho 1965) .. 22
Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 2, 3, 14, 15, 18, 20
Konigsberg v. *State Bar of California*, 353 U.S. 252 (1957) 21
Scales v. *United States*, 367 U.S. 203 (1961) 17
Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) 21
Shelton v. *Tucker*, 364 U.S. 479 (1960) 20
Shub v. *Simpson*, 196 Md. 177, 76 A.2d 332 (1950), *appeal dismissed*, 340 U.S. 881 (1950) ... 4, 5, 6, 8, 10, 12
Slochower v. *Board of Higher Education*, 350 U.S. 551 (1956) 21, 22
Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) .. 11-12, 16
Whitehill v. *Elkins*, 258 F.Supp. 589 (D. Md. 1966) ... 6, 12
Yates v. *United States*, 354 U.S. 298 (1957) 19

CONSTITUTION OF THE UNITED STATES:

U. S. Const. Amend I 3, 8, 20, 23
U. S. Const. Amend V 21
U. S. Const. Amend XIV 8, 23

STATUTES:

Page

Md. Code Ann. Art 85(A) (1957),
Section 10 4
Section 11 ..... 4, 10, 11, 16
Section 12 ..... 4, 10, 16
Section 13 ..... 4, 10, 12, 16
Section 14 ..... 4, 20
Section 15 ..... 4, 10, 16
Section 18 13

AUTHORITIES:

Glass, *Bentley Glass on Test Oaths,* 46 A.A.U.P. Bull. 290 (1960) 2, 23-24
Machlup, *On Some Misconceptions Concerning Academic Freedom,* 41 A.A.U.P. Bull. 753 (1955) 11
N.Y. Times, May 1, 1967, p. 60, col. 1 6
Press Release of the Attorney General of Maryland, May 3, 1966 6

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BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE

The American Association of University Professors appears *amicus*, with consent of all parties, in support of the position advanced by appellants.

INTEREST OF AMICUS

The American Association of University Professors is the national professional organization of teachers and research scholars in all disciplines at accredited colleges and universities in the United States. It has 1036 chapters and over 80,000 members in such institutions. It is estimated that such membership constitutes approximately 30 per cent of total full-time faculty in accredited institutions of higher learning.

The Association and its members have a significant interest in the present case because the statute, which

refers specifically to teachers in state institutions—as if to emphasize its application to education, including higher education—seriously threatens academic freedom and the liberties of college and university professors. This threat is particularly acute with respect to present and prospective members of the academic profession who live and teach in the State of Maryland, and may naturally be expected to receive opportunities for employment at the State University. The academic profession is in a very real sense a nation-wide one, however. It depends for its opportunities and the fulfilment of its mission on the policies and activities of institutions of higher learning in all states.

The conscientious inability of this appellant to execute the required certificate by no means stands alone. A former president of the American Association of University Professors, then a member of the faculty of Johns Hopkins, was prevented by the required oath from serving the State of Maryland in an advisory capacity in 1960. See 46 A.A.U.P. Bull. 290 (1960). His action called attention to the threat posed by the Ober Law and other similar statutes. This threat has undoubtedly caused major loss to the University, to higher education in general, and to the entire academic profession.

The Association, through a special committee and participation in litigation wherever possible, seeks to challenge such laws. Most recently, the Association filed a brief *amicus curiae* in this Court in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967). That brief detailed more extensively the nature and history of the Association's long concern with loyalty-security laws which jeopardize academic freedom. The reasons for its concern have nowhere been more forcefully stated

than in this Court's opinion in the *Keyishian* case, *supra* at 603:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "market place of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection". . . .

STATEMENT OF FACTS

The appellant was denied a teaching position at the University of Maryland solely because of his conscientious refusal to sign the Certificate of Application for Public Employment which accompanied the offer. The Certificate requires the applicant to certify that he is "not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence," subject to the penalties of perjury prescribed by Maryland law. All prerequisites had been met, and negotiations between appellant and University officials were complete, when the troublesome matter of the oath arose unexpectedly. That barrier to Maryland state employment was based upon the Attorney General's interpretation of the Subversive Activities Law of 1949 (commonly called the Ober Law). A brief analysis of the provisions of that

statute seems essential before developing the argument of *amicus curiae*, (*Amicus* will rely in other respects upon the statement of the facts contained in appellant's brief.)

Several sections of the Ober Law are especially relevant to this case. Section 10 declares ineligible for public employment any person who is a "subversive person"—a term which is defined at several places in the statute. Section 13 requires every state employee and applicant for state employment to submit a written statement—subject to penalties for perjury—that he is not a "subversive person." Section 11 requires government agencies to adopt procedures to ensure that no "subversive persons" will be employed by the State. (Under section 12, alternative procedures may be adopted for "laborers" where the employing agency determines that the nature of their work does not sufficiently jeopardize the security of the State.)

Section 14 provides for the dismissal of any person whom the employing agency reasonably believes to be a "subversive person." Specific procedures for the conduct of discharge hearings are detailed in that section. Any person so discharged may appeal the administrative decision to a state court. Finally, section 15 requires candidates for elective office to sign a certificate similar to that which section 13 requires of applicants for appointive positions.

The Ober Law was enacted in 1949. Several test cases rapidly brought the constitutionality of this law before the Maryland courts. These early tests chiefly involved the application of section 15 to candidates for elective office. In *Shub* v. *Simpson*, 196 Md. 177, 76 A.2d 332 (1950), *appeal dismissed*, 340 U.S. 881 (1950), the Maryland Court of Appeals sustained that section

against several constitutional challenges. Many of those challenges have no bearing upon the present case. Directly apposite, however, was the appeal taken to this Court by one party to a companion case, *Gerende* v. *Board of Supervisors,* 341 U.S. 56 (1951). A *per curiam* opinion of this Court affirmed the Maryland judgment. Reliance was placed upon a narrowing construction of the Ober Law, suggested both by the Maryland Court's *Shub* opinion and by the State Attorney General at the bar of this Court.

The Maryland Court of Appeals had suggested that the purpose of the Ober Law was identical to the purpose of a contemporaneous state constitutional amendment—"to prevent infiltration in our state, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence.*" *Shub* v. *Simpson, supra* at 192, 76 A.2d at 338 (italics in original). This Court thus read the *Shub* decision as holding that, to obtain a place on the Maryland ballot, a candidate need only "make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt." 341 U.S. at 56-57 (italics in original). The Court also relied upon the Attorney General's declaration that "he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement." *Id.* at 57. There have been no subsequent cases either in the Maryland courts or in this Court involving the key provisions of the Ober Law.

There have, however, been several quite relevant administrative decisions and actions which bear upon this

case. Following this Court's April 1966 decision in *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966), Maryland's Attorney General revised the terms of the required loyalty certificate. This revision deleted the disclaimer of membership in "subversive organizations." The revision was effected after consultation with the draftsman of the Ober Law. Attorney General Finan announced in a press release on May 3, 1966, that he and former representative Ober felt the new certificate "complies with the most recent decision of the United States Supreme Court in the case of *Elfbrandt* v. *Russell* . . .". At no time were the courts or the legislature, nor even the Governor, formally involved in this revision (although the Governor was eventually apprised of the change by letter).

In the spring of 1966 the Attorney General announced another change in his interpretation of the Ober Law. For the first time since 1950, a candidate for Congress from Maryland was permitted to file without signing the loyalty oath. This change occurred when the Attorney General's office reversed an opinion—announced earlier that very week—and ruled that candidates for *federal* offices could not be subjected to the oath requirement. N. Y. Times, May 1, 1967, p. 60, col. 1. Ironically, this change reflected the qualification which the Maryland Court of Appeals had placed upon the Ober Law fully seventeen years earlier, in the *Shub* decision.

The decision below, *Whitehill* v. *Elkins*, 258 F. Supp. 589 (D. Md. 1966), is the first judicial construction of the oath since the *Shub* and *Gerende* decisions. Despite the profound changes in relevant constitutional law which have intervened, the court below sustained the oath on authority of *Gerende*. It therefore did not

reach the constitutional questions surrounding the terms of the Ober Law. All three members of the district court concurred in this disposition. Circuit Judge Sobeloff, however, expressed reservations both about the soundness of *Gerende* and about the constitutionality of the oath apart from that precedent. But he added that any rejection of or departure from *Gerende* must come from this Court. This appeal thus squarely presents important questions about the relevance and current status of the *Gerende* case.

SUMMARY OF ARGUMENT

Amicus curiae will contend that the constitutionality of the Ober Law is squarely and inescapably before this Court. Notwithstanding the *Gerende* decision, we shall contend that the operative terms of the Ober Law upon which the loyalty oath requirement is based are clearly unconstitutional under recent decisions of this Court. Because of the close interdependence of the statute and the certificate, and the history of the Maryland loyalty oath, the two cannot validly be separated as the district court sought to do. Thus the oath requirement, and the statute upon which it rests, infringe upon the liberties of members of the academic community and other Maryland government employees.

Even if only the language of the certificate were now before this Court, we would contend that Maryland has imposed an unconstitutional condition upon academic and other public employment. Several contentions support this conclusion: First, the central terms of the oath—particularly the phrase "in one way or another"—are unconstitutionally vague. Second, the statute provides no procedure by which a non-signer

may demonstrate his loyalty or his fitness for employment. Third, the certificate is unconstitutional because there are regulatory devices available to serve essentially the same goals—to the extent the State may constitutionally pursue them. Such devices pose no sweeping hazards to freedom, especially to academic freedom when teachers are involved, as in the present case. For these three reasons we contend that the certificate, apart from the underlying statute, violates the First and Fourteenth Amendments of the United States Constitution. We would urge, however, that the constitutionality of statute and oath must be considered together, because of their integral relationship, and not separately.

ARGUMENT

I. THE LOYALTY OATH REQUIREMENTS OF THE OBER LAW ARE PROPERLY BEFORE THIS COURT AND ARE CLEARLY UNCONSTITUTIONAL.

A. This Appeal Directly Challenges the Constitutionality of the Relevant Provisions of the Ober Law

The District Court declined to reach the terms of the Maryland statute because of this Court's decision in *Gerende* v. *Board of Supervisors, supra.* In that case, this Court deemed it unnecessary to consider the constitutionality of the Ober Law's disclaimer provisions. This abstention was based upon a reading of the Maryland opinion in *Shub* v. *Simpson, supra,* and the State Attorney General's representations during oral argument. We contend in Section I of this brief that *Gerende* should no longer be read as authority for divorcing the language of the oath certificate from that of the statute. If it must be so read, then we urge that *Gerende* should be overruled because it is inconsistent with present constitutional doctrine.

1. Gerende Did Not Consider and Approve the Constitutionality of the Oath Certificate Apart from the Ober Law. This Court recently noted the limited scope of the *Gerende* decision. A footnote in *Baggett* v. *Bullitt*, 377 U.S. 360, 368 n.7 (1964) recalls that "the Court [in *Gerende*] . . . did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes." It seems equally clear that the Court did not squarely uphold the language of the present oath certificate isolated from the questionable provisions of the Ober Law. Several factors support this contention.

After the Attorney General offered his narrowing construction during oral argument, this Court properly went no further than to hold that a constitutional decision would be premature at that time. The narrower language on which the Attorney General relied had been suggested by the Maryland Court of Appeals, but had not yet been fashioned into an oath or certificate. If this Court had meant to sustain the language of the present certificate on the merits, it would presumably have invited further argument and briefing of that issue. Presumably, too, it would have cited some authority to bolster so significant a constitutional judgment. The absence of either invitation for re-argument after the Attorney General's suggestion, or any discussion of constitutional principles in the brief *per curiam* opinion, suggests that *Gerende* in fact postponed, rather than adjudicated, the constitutional questions which are presented here.

There is a second reason why *Gerende* should not be read as precedent for judging the certificate in isolation from the Ober Law. The opinions of the Maryland Court of Appeals, upon which this Court partially

relied in *Gerende,* were ambiguous on this question to a degree that precludes clear characterization. At various places in the *Shub* opinion, the Maryland court seemingly sustained the vague terms "subversive person" and "subversive organization"; explicit references to those provisions are not wanting. The concluding portion of the opinion seems, however, to have assumed that the narrowing construction was essential to the validity of the Ober Law. Yet the certificate embodying that language was not yet in existence; the more felicitous phrasing was merely a judicial suggestion. Thus it would appear that this Court would have wanted clearer signals from below before sustaining on the merits, as the State's loyalty oath, a disclaimer which had not even been passed upon squarely by the state courts. For both these reasons, the summary opinion in *Gerende* should be read only as a postponement of the constitutional issues until the proposed language had been adopted as the State's loyalty oath and required of applicants or candidates. Nothing in that case warrants the divorce of oath from statute which the district court decreed in the present case.

Even if *Gerende* be read as allowing the separation of the oath from the statute, there is an important additional reason why it does not control the present case. The constitutional attacks in *Shub* and *Gerende* were mounted by candidates for *elective* offices. Their concern was with the oath required by section 15, rather than with the provisions of sections 11-13, which presumably underlie the oath demanded of *appointed* officials. While the coverage of the two sections is virtually identical, there is one basic difference: While an elective official or candidate need only file the oath

before seeking office, the appointed official remains subject to the disqualifying provisions of the Ober Law throughout his service to the State. For the political candidate, therefore, filing the oath is the end of his concern with the Ober Law; for the appointed official, it is but the beginning of a possibly life-long concern with Maryland's loyalty-security arrangement. The rules and regulations which section 11 requires each public agency to promulgate attest to the continuing concern of the government with the loyalty of its employees.

Such continuing surveillance as the Ober Law imposes upon appointed officials is particularly hostile to academic freedom. The fear of dismissal is particularly acute in the academic profession. For, as a distinguished educator has recently observed, "More than in most other occupations, the dismissal of a professor jeopardizes or destroys his eligibility for another position in his occupation. . . . If he loses his position for what he writes or says, he will, as a rule, have to leave his profession, and may no longer be able effectively to question and challenge accepted doctrines or effectively to defend challenged doctrines." Machlup, *On Some Misconceptions Concerning Academic Freedom,* 41 A.A.U.P. Bull. 753, 756 (1955). It was a similar kind of surveillance which this Court condemned in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957). The plurality opinion of the Chief Justice is particularly apposite:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait-jacket upon the

> intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Thus, even if *Gerende* did uphold the attempted separation of the political candidate's oath from the Ober Law, there are important reasons why the question presented here is a distinctly different one. Not only does this oath apply to appointive officials; more important, the application of the oath, with its attendant surveillance procedures, to an academic employee makes it particularly offensive in a way that could not have been considered in *Shub* and *Gerende*.

2. **The Constitutionality of the Oath Certificate Cannot Logically Be Judged Apart from the Underlying Provisions of the Statute.** Whatever *Gerende* may have held, it is illogical in light of recent constitutional developments to judge the oath certificate without appraising the relevant portions of the Ober Law. Several considerations warrant an integral view of oath and statute. First, the statute affords the only possible basis in state law for imposing the oath requirement. As Judge Sobeloff recognized in his concurring opinion below, arguably the oath should not "be judged in isolation, but in conjunction with the statute, for in the absence of a statute, there would be no authority for demanding any statement. . . ." 258 F. Supp. at 597 (concurring opinion). Second, the certificate itself invokes the authority of the statute as its raison d'être. Immediately below the heading on the certificate form appears the phrase "Required by law (Art. 85A, paragraps 13, Annotated Code of Maryland, 1957)." No

recognition of the close interdependence of oath and statute could be clearer than this—contained as it is in the very certificate which appellees seek to divorce from its legislative foundation.

Third, the severability clause (section 18) of the Ober Law is wholly irrelevant here. Even if severance might be appropriate, *cf. Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), the instant question is not one of severability at all. The effort here is not to rescue one part of a statute from a judgment invalidating another part of the same law. Rather the issue is whether to judge a persistent, though informal, administrative implementation and enforcement of a statute in context of a clearly unconstitutional statutory authorization. Any reference to severability in this setting is therefore wholly inappropriate.

Finally, the relationship between oath and statute here is analogous to that involved in *Elfbrandt* v. *Russell, supra.* The oath involved in that case was innocuous enough standing alone. It was held unconstitutional, however, because a statutory gloss added after the original enactment gave a new and far more pervasive meaning to its once innocent provisions. This Court could hardly have overlooked the statutory gloss in judging the validity of the bare oath. Here too the terms of the statute, although enacted before rather than after the promulgation of the oath, should be judged as though they were found in the same legal document.

3. **Separation of the Oath From the Ober Law Perpetuates the Uncertainty and Ambiguity Surrounding the Statute and Its History.** As the opinions of the court below reveal, there is grave uncertainty about

the relationship between the Ober Law and the oath. A public employee might well assume that by signing the oath certificate he had complied with the terms of the Ober Law. He might equally wonder whether more would not later be asked of him, in view of the dissonance between the statute's broad terms and the oath's more specific language. The representations of an earlier Attorney General and the short *per curiam* opinion of this Court in *Gerende* afford meager assurance to one who is truly concerned about the meaning of his pledge, and who is sincerely anxious to comply with all applicable laws.

The contention of the State here, as in *Baggett* v. *Bullitt, supra,* "ignores not only the effect of the oath on those who will not solemnly swear unless they can do so honestly and without prevarication and reservation, but also its effect on those who believe the written law means what it says. . . . Even if it can be said that a conviction for falsely taking this oath would not be sustained, the possibility of a prosecution cannot be gainsaid." 377 U.S. at 374. Earlier this year, in *Keyishian* v. *Board of Regents, supra,* this Court displayed similar concern for the conscientious public employee confronted with an ambiguous and confusing loyalty-security law: "It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery." 385 U.S. at 601. As *Keyishian* and other recent decisions of this Court make eloquently clear, the risks are greater, and the reluctance consequently more understandable, when the applicant is a member of the academic profession. And when academic personnel are deterred by such doubts

and cautions, not only the profession but the entire nation suffers, for "academic freedom . . . . is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian* v. *Board of Regents, supra* at 603.

Such doubts and fears seem even more likely in Maryland than they might have been among Washington or New York public employees. Not only does Maryland's certificate rest upon a very slender reed, but the several administrative revisions it has undergone warrant even greater doubts for the future. In the absence of any official action by other branches of the state government, might a public employee reasonably wonder whether a change in administration at Annapolis might undermine the interpretation given by a previous Attorney General?

In fact, the language of the oath which appellant refused to sign is not even the language suggested at the time of *Gerende* and originally fashioned into the oath certificate. The nature of the change was rather minor, to be sure. The informality and rather haphazard process by which the change was effected—consultation between the Attorney General and the draftsman of the statute, a former legislator—is far more revealing than the resulting revision of the wording. The two ingredients combine, however, to reinforce the doubts created by a widening gap between the language of the statute and of the oath certificate. To place the burden of resolving those doubts upon the applicant for employment may well exclude from public service many persons who are unwilling to incur the risks of calling close questions in their own favor.

4. The Promulgation of the Certificate Raises Serious Constitutional Questions About the Delegation of Legislative Authority. Here, as in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), the legislature has not specifically authorized the administrative action taken by the Attorney General. And as in *Sweezy*, that action directly affects the sensitive area of internal security and free expression. Whether the Maryland legislature would ratify this certificate, or would have preferred some other form of oath, we have no way of knowing. Thus, one ground on which a plurality of this Court invalidated the New Hampshire Attorney General's investigation in *Sweezy* seems directly apposite:

> Separating the wheat from the chaff, from the standpoint of the legislature's object, is the legislature's responsibility because it alone can make that judgment. In this case, the . . . legislature has delegated that task to the Attorney General.
>
> As a result, neither we nor the state courts have any assurance that the questions petitioner refused to answer fall into a category of matters upon which the legislature wanted to be informed when it initiated this inquiry .... The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. (354 U.S. at 254)

B. The Loyalty Oath Provisions of the Ober Law Clearly Violate the First and Fourteenth Amendments

The restrictions imposed by sections 11-13 and 15 of the Ober Law are virtually indistinguishable from those held unconstitutional in *Baggett* v. *Bullitt, supra.* That decision found the very terms that are central to the Ober Law's disclaimer—"subversive persons" and

"subversive organization"—to be fatally vague and uncertain. Here, as in *Baggett* and *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961), the statutory terms afford no guidance to the applicant as to what he must disclaim or foreswear when he enters government service. A broad range of activities and affiliations—some within the reach of state prohibitory power, but most constitutionally protected—is potentially covered by such terms. Whatever power the State may have to deny government employment to persons who seriously threaten the security of the government, "measures which purport to define disloyalty must allow public servants to know what is and what is not disloyal." *Baggett* v. *Bullitt, supra* at 380. Thus there can be no doubt about the unconstitutionality of the only terms of the Ober Law that are relevant to the loyalty oath requirement.

II. THE TERMS OF THE OATH CERTIFICATE ARE UNCONSTITUTIONAL EVEN IF THE UNDERLYING STATUTORY PROVISIONS ARE NOT IN ISSUE.

A. The Terms of the Certificate Are Unconstitutionally Vague

Although the Maryland oath certificate may be briefer and less elaborate than other oaths which this Court has recently struck down, its terms are nevertheless unconstitutionally vague. The vagueness derives chiefly from the expansive and elusive phrase, "in one way or another"; the applicant must swear that he is not "engaged in one way or another in the attempt to overthrow the government . . . by force or violence." That phrase might possibly be confined to overt activities for which one can be prosecuted under existing internal security laws, *cf. Scales* v. *United States,* 367 U.S. 203 (1961). An equally plausible construction would, however, include a wide range of activities

which may not be constitutionally proscribed. A person who is a mere knowing member of a subversive organization might well be held to be "engaged in one way or another" in attempting to overthrow the government. Such knowing membership may not constitutionally be proscribed as a condition of public employment, *Elfbrandt* v. *Russell, supra; Keyishian* v. *Board of Regents, supra.*

Many other forms of constitutionally protected activity and affiliation might conceivably be reached—particularly in light of the tortuous history of the certificate. While many of the possible constructions may seem far-fetched, "[t]he very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language. With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive." *Cramp* v. *Board of Public Instruction, supra* at 286.

The vagueness of the oath is made even more serious by the absence of any state court decisions defining its scope. The Maryland courts have not spoken on the question since they suggested some 17 years ago the very language now embodied in the certificate. Those cases were decided in a constitutional framework radically different from the context within which this case arises. Allegedly subversive activities which might once have justified even criminal sanctions may no longer serve as grounds for disqualification from public employment or other government benefits. Yet the Maryland oath still contains language which was deemed a constitutional exercise of the State's power

at that much earlier time. Those words can be adapted to fit the new constitutional framework only by attributing to them a flexibility which renders them even vaguer than they appear on the face of the oath.

Thus the key phrase of Maryland's oath turns out to be no more precise or informative than the language which this Court held unconstitutionally vague in *Cramp* and *Baggett*. Doubts which might reasonably have plagued an applicant for public employment in Florida or Washington might equally concern his Maryland counterpart. Nothing in the oath or its history assures the signer that its interpretation and enforcement will be confined to activities which the State may constitutionally reach. So long as the phrase "engaged in one way or another" remains at large, the oath certificate cannot survive even if it is isolated from the taint of the statutory language.

Any suggestion that the oath reaches only overt attempts to overthrow the government by force and violence seems illogical in light of Maryland's quite detailed provisions directed at sedition and subversion. If the oath reached only such overt activities, then it would be superfluous. Moreover, had the intent of the draftsmen been so limited, they could surely have used more precise language. Finally, the terms of the oath would presumably have been changed more radically than they have been following recent decisions of this Court, *e.g.*, *Yates* v. *United States*, 354 U.S. 298 (1957). Thus the only plausible reading of the oath carries its reach substantially beyond activities which this Court has held state governments may constitutionally proscribe. Such an oath may therefore not be required as a condition of public employment.

B. Maryland Must Rely Upon Less Restrictive Means of Serving the Essential Purposes of the Oath

When a state seeks to justify use of a restriction or condition that strikes directly at First Amendment freedoms, it incurs a heavy burden. In a line of cases beginning with *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960), this Court has stressed that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Most recently, in *Keyishian* v. *Board of Regents, supra* at 602, this Court reaffirmed that principle, adding that "the principle is not inapplicable because the legislation is aimed at keeping subversives out of the teaching ranks." Maryland has not met the burden of justification in this case. Nor would it be easy for the State to do so, in view of the many direct sanctions and more specific forms of regulation found elsewhere in the Ober Law. Thus even if the oath certificate's terms were not unconstitutionally vague, the availability of less restrictive means for achieving the same purposes would independently invalidate the requirement.

C. The Certificate Provides No Procedure by Which a Non-Signer Can Demonstrate His Fitness for Public Employment

Under section 14 of the Ober Law, a person who has once been appointed may not be discharged because of suspected disloyalty without a rather elaborate hearing. Neither in the certificate nor in the statute, however, are any such procedures provided for an applicant. Even a prospective employee for whom negotiations are complete, save for the oath (as was the case with this appellant), is given no opportunity to prove his loyalty or explain his reasons for refusing

to sign the oath. If he fails to sign at such a late stage, not only does he forfeit a position for which he is otherwise qualified, but even more serious, he suffers the stigma of having balked at the oath, however scrupulous may have been his reasons. The absence of such a procedure is equally harsh on the prospective employee who discovers the oath early in his quest for a Maryland state position; after such a discovery, he is unlikely ever to reach the stage at which he could even challenge the constitutionality of the oath requirement, as appellant has done here.

This Court has never reached the question whether due process requires some type of hearing before a non-signer may be disqualified solely because he will not sign a required oath. Procedural safeguards have generally been reserved for the incumbent, with far less solicitude shown for the applicant. But recent decisions of this Court point the way to a corresponding guarantee for the prospective employee who risks the stigma of a non-signer. *Slochower* v. *Board of Higher Education,* 350 U.S. 551 (1956), is particularly apposite. There the Court refused to permit New York to draw an automatic inference of disloyalty from an employee's invocation of the Fifth Amendment privilege against self-incrimination. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957), and *Konigsberg* v. *State Bar of California,* 353 U.S. 252 (1957), extended a comparable protection to applicants for admission to the bar who were suspected of disloyalty because of their refusal to disclose certain past associations.

On the basis of these precedents, a three-judge federal district court recently found Idaho's loyalty oath unconstitutional because it afforded no procedure by

which the non-signer might explain his actions and vindicate his loyalty. In *Heckler* v. *Shepard*, 242 F. Supp. 841, 845 (D. Idaho 1965), the court concluded that "no discharge of a public employee, which operates to bestow a 'badge of disloyalty' or to create a 'built-in inference of guilt; will be permitted without according the right to such hearing as is requisite to due process of law." The court acknowledged that a state may impose reasonable qualifications upon public employment. Yet before such employment is denied, "facts must first appear which bear some essential logical relationship to the prescribed standards, lest disqualification for employment be so unreasonable as to constitute a denial of due process of law." *Id.* at 845-846. The vice of the Idaho statute was the automatic and arbitrary nature of the disqualification: "[T]here is no concern for the employee's reasons; whether they are with or without justification; whether they are founded upon claimed constitutional guarantees. Even if a public employee holds steadfast conviction that the Federal Constitution shields him from being compelled to make the disclosures required, the Idaho statute affords but two alternatives: either to take the oath, or to suffer summary discharge from State employment." *Id.* at 846.

The Maryland statute is constitutionally vulnerable on just this ground. Here, as in *Slochower*, to draw an inference of disloyalty and disqualification from an unexplained refusal to sign—and without even affording an opportunity to explain—deprives the applicant of due process of law in the most basic sense. Thus Maryland's loyalty oath scheme is procedurally, as well as substantively, deficient.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to hold Maryland's loyalty certificate, and the statutory provisions upon which it is based, unconstitutional under the First and Fourteenth Amendments. We offer, as our concluding statement, a portion of a letter which Professor Bentley Glass, former President of the Association, addressed to the then Governor of Maryland. This letter sought to explain why Professor Glass had declined an appointment to the Radiation Control Advisory Board of the State of Maryland because the appointment was conditioned upon signing the Maryland loyalty certificate. Among his objections to the oath were the following:

> I am . . . profoundly convinced that this law has done Maryland great harm already, and will do even more in the future, by preventing our state from securing the ablest leaders in education and political life. I know for a fact that some, and perhaps many, of our finest scientists and teachers chafe under the continuing insult to their integrity imposed by this requirement, and will leave at the first good opportunity. And I know that it has proved a severe hindrance in recruiting to state service able young men of independent mind and a love of freedom. The end of this road cannot lead anywhere but to an amassing of mediocrity in our colleges and universities and other schools, where daring original thought and courageous leadership are so vitally important to the public welfare. . . . The tempo of scientific and technological change is so rapid, and is accelerating so rapidly, that profound social changes are made necessary. In the present temper of America, any advocate of social change is quite certain to be labeled a Communist. Yet it is only by finding the right new ideas that our society can defend itself against

Communism and can prevent itself from being engulfed by Communism. I assert that we are doing almost everything we can to prevent America from arming herself with ideas. The Ober Act, and specifically the antisubversive requirement, is a prime example of the unwisdom of our action. *Bentley Glass on Test Oaths,* 46 A.A.U.P. Bull. 290, 291 (1960).

Respectfully submitted,

BERNARD WOLFMAN
3400 Chestnut Street
Philadelphia, Pennsylvania

HERMAN I. ORENTLICHER
1785 Massachusetts Avenue, N. W.
Washington, D. C.

Attorneys for Amicus Curiae

Of Counsel:

ROBERT M. O'NEIL
Boalt Hall (School of Law)
Berkeley, California

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IN THE

Supreme Court of the United States

October Term, 1967

No. 25

HOWARD JOSEPH WHITEHILL,

Appellant,

—v.—

WILSON ELKINS, President, University of Maryland, and the BOARD OF REGENTS, University of Maryland,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE APPELLANT

SANFORD JAY ROSEN
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

ELSBETH LEVY BOTHE
41 West Preston Street
Baltimore, Maryland 21201

JOSEPH S. KAUFMAN
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202
Attorneys for Appellant

LEE M. MILLER
1100 One Charles Center
Baltimore, Maryland 21202
Of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes, Certificates and Administrative Rulings Involved	3
Questions Presented	3
Statement	5
A. The Facts in This Suit	5
B. Factual Outline and History of Maryland's Subversive Activities Law	8
Summary of Argument	16
ARGUMENT	20
I. The "Certification of Applicant for Public Employment" and the Maryland Subversive Activities Act of 1949, which requires its execution as a condition to public employment, are unconstitutionally vague, uncertain, and broad in violation of due process of law	20
A. Maryland's Law and the "Certification" are not protected from constitutional attack by this Court's 1951 decision in *Gerende* v. *Board of Supervisors of Elections*	20

PAGE

B. Under long standing constitutional principle and recent decisions of this Court declaring unconstitutionally vague, uncertain and broad statutes of other states that were virtually identical to the Maryland Subversive Activities Act, particularly with respect to definitions, Maryland's statute is unconstitutionally vague, uncertain and broad on its face, as applied, and as judicially construed, and both it and the required "Certification" are therefore invalid conditions or limitations on public employment 32

C. The definitional, oath and loyalty provisions of Article 85A being unconstitutionally vague, uncertain and broad, the entire statute must fall notwithstanding the inclusion in it of a standard severability clause 42

II. Loyalty oaths and provisions, including Maryland's, that are indiscriminately required of or imposed upon all public employees and applicants for public employment, particularly teachers, are unconstitutional infringements on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution 46

III. The Maryland Act and "Certification" infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without

PAGE

affording a hearing on the issue of loyalty or subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law 52

IV. The required "Certification" and the statute pursuant to which it is given constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution 60

CONCLUSION 62

APPENDIX:

First Amendment, U. S. Const. 1a

Fifth Amendment, U. S. Const. 1a

Fourteenth Amendment, U. S. Const. 1a

Article 1, Section 10, U. S. Const. 2a

Article 85A, Md. Code Annot. (1957) 3a

"Certification of Applicant for Public Employment" 16a

Letter from Attorney General Finan to Governor Tawes (May 13, 1966) 17a

Compilation of State Loyalty Standards for Teachers 19a

Spangler v. Board of Regents (Docket No. 241, D. Ct. of Lancaster County, Nebraska, April 17, 1967) 24a

Gallagher v. Smiley, —— F. Supp. —— (Civ. Action No. 66-C-608, April 24, 1967) 27a

PAGE

Table of Authorities

Cases:

Adler v. Board of Education, 342 U. S. 485 .....26, 27, 47, 63
American Communications Ass'n v. Douds, 339 U. S. 382 .....24, 25
In re Anastoplo, 366 U. S. 82 .....47, 54
Aptheker v. Secretary of State, 378 U. S. 500 ....26, 32, 34, 38, 40, 53
A Quantity of Books v. Kansas, 378 U. S. 205 54

Baggett v. Bullitt, 377 U. S. 360 .....*passim*
Baggett v. Bullitt, 215 F. Supp. 439 (W. D. Wash. 1963) 28
Bantam Books v. Sullivan, 372 U. S. 58 54
Barenblatt v. United States, 360 U. S. 109 49
Bates v. Little Rock, 361 U. S. 516 .....18, 50, 51
Beilan v. Board of Education, 357 U. S. 399 47
Bell v. Maryland, 378 U. S. 226 .....43, 44
Bomar v. Keyes, 162 F. 2d 136 (2d Cir. 1947) 64
Bond v. Floyd, 385 U. S. 116 .....*passim*
Brush v. Board of Higher Education, —— Ore. ——, 422 P. 2d 268 (1966) 33

Carter v. Carter Coal Co., 298 U. S. 238 43
Commerce Oil Refining Corp. v. Minor, 170 F. Supp. 396 44
Connally v. General Construction Co., 269 U. S. 385 32
Cramp v. Board of Public Instruction, 368 U. S. 278 3, 32, 33, 34, 41, 48
Cummings v. Missouri, 71 U. S. (4 Wall.) 277 .....20, 60

PAGE

DeGregory v. Attorney General of New Hampshire, 383 U. S. 825 ..... 49, 51, 53
Dennis v. United States, 341 U. S. 494 56
Dombrowski v. Pfister, 380 U. S. 479 ..... 17, 29, 34, 38, 40, 42
Dorchy v. Kansas, 264 U. S. 286 ..... 43, 44
Dunne v. United States, 138 F. 2d 137 (8th Cir. 1943) .. 24

Elfbrandt v. Russell, 384 U. S. 11 ..... *passim*
Elfbrandt v. Russell, 97 Ariz. 140, 397 P. 2d 944 (1965) 29

Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U. S. 73 3
Freedman v. Maryland, 380 U. S. 51 56

Gallagher v. Smiley, —— F. Supp. —— (D. Col. April 24, 1967) 33
Ex parte Garland, 71 U. S. (4 Wall.) 333 ..... 20, 60
Garner v. Board of Public Works, 341 U. S. 716 ..... 40, 47, 48, 49, 61
Garrity v. New Jersey, 385 U. S. 493 ..... 46, 52, 59
In re Gault, 87 S. Ct. 1428 53
Georgia Conf. of AAUP v. Board of Regents, 246 F. Supp. 553 (N. D. Ga. 1965) 30, 33, 40
Gerende v. Board of Supervisors of Elections, 197 Md. 282, 78 A. 2d 660 (1951), *aff'd per curiam*, 341 U. S. 56 ..... *passim*
Gibson v. Florida Legislative Committee, 372 U. S. 539 ..... 34, 49, 51
Gojack v. United States, 384 U. S. 702 51
Griswold v. Connecticut, 381 U. S. 479 51

Hammond v. Frankfeld, 194 Md. 487, 71 A. 2d 482 (1950) 14

PAGE

Hammond v. Lancaster, 194 Md. 462, 71 A. 2d 474 (1950) 14
Heckler v. Shepard, 243 F. Supp. 841 (E. D. Idaho 1965) 33, 53, 54, 55
Huebeck v. City of Baltimore, 205 Md. 203, 107 A. 2d 99 (1954) 18, 43, 44, 45
Hurwitz v. Director's Guild of America, 364 F. 2d 67 (2d Cir. 1966), *cert. denied* 385 U. S. 971 33

Kennedy v. Mendoza-Martinez, 372 U. S. 144 54
Keyishian v. Board of Regents, 385 U. S. 589 ..... *passim*
Knight v. Board of Regents, —— F. Supp. ——, 35 U. S. L. W. 2774 (S. D. N. Y. 1967) 33
Konigsberg v. State Bar of California, 366 U. S. 36 ..... 47, 54
Konigsberg v. State Bar of California, 353 U. S. 252 47

Lamont v. Postmaster General, 381 U. S. 301 ..... 19, 49, 57, 59
Lanzetta v. New Jersey, 306 U. S. 451 32
Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N. W. 2d 605 (1955) 49, 51
Lerner v. Casey, 357 U. S. 468 47

Marcus v. Search Warrant, 367 U. S. 717 54

NAACP v. Button, 371 U. S. 415 40
National Can Corp. v. State Tax Com'n, 220 Md. 418, 153 A. 2d 287 (1959) 43
Nelson v. Los Angeles County, 362 U. S. 1 ..... 47, 54
New York Times Co. v. Sullivan, 376 U. S. 254 49
Nostrand v. Little, 362 U. S. 474 54
Nostrand v. Little, 58 Wash. 2d 111, 361 P. 2d 551 (1961) 54
Noto v. United States, 367 U. S. 290 ..... 25, 34, 35

PAGE

Opinion of the Justices, —— N. H. ——, 228 A. 2d 165 (1967) 33

Pedlosky v. Massachusetts Institute of Technology, —— Mass. ——, 224 N. E. 2d 414 (1967) 33, 45
Pennsylvania v. Nelson, 350 U. S. 497 .....11, 45
Poe v. Ullman, 367 U. S. 497 51

Railroad Retirement Board v. Alton R.R., 295 U. S. 330 43
Reed v. Gardner, 261 F. Supp. 87 (C. D. Calif. 1966) 33
Reitz v. Mealey, 314 U. S. 33 .....18, 44

Scales v. United States, 367 U. S. 203 .....25, 34, 35
Schneider v. Rusk, 377 U. S. 163 49
Shelton v. Tucker, 364 U. S. 479 .....2, 18, 34, 46, 48, 52
Sherbert v. Verner, 374 U. S. 398 .....49, 53
Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950) ....*passim*
Skinner v. Oklahoma, 316 U. S. 535 43
Slochower v. Board of Education of New York, 350 U. S. 551 53
Smith v. California, 361 U. S. 147 .....32, 56-57
Spangler v. Board of Regents, Docket No. 241, D.Ct. Lancaster County, April 17, 1967 33
Speiser v. Randall, 357 U. S. 513 .....3, 19, 49, 55, 56, 59
Spevak v. Klein, 385 U. S. 511 .....52, 59
Sweezy v. New Hampshire, 354 U. S. 234 .....3, 39, 49, 51

Thornhill v. Alabama, 310 U. S. 88 40
Torcaso v. Watkins, 367 U. S. 488 .....48, 53, 54

United States v. Brown, 381 U. S. 437 .....20, 25, 48, 61

PAGE

United States v. Dennis, 183 F.2d 201 (2d Cir. 1950) 24, 25, 35
United States v. Lovett, 328 U. S. 303 60

West Virginia State Board of Education v. Barnette, 319 U. S. 624 53
Wieman v. Updergraff, 344 U. S. 183 ..... 48, 49, 54
Weiss v. Gardner, 386 U. S. 9 33
Weiss v. Gardner, 263 F. Supp. 186 (S. D. N. Y. 1966) 33
Whitehill v. Elkins, 258 F. Supp. 589 (D. Md. 1967) *passim*
Williams v. Standard Oil of Louisiana, 278 U. S. 235 44
In re Wisconsin Builders Supply Co., 239 F. 2d 649 (7th Cir. 1956) 44
Winters v. New York, 333 U. S. 507 32

Yates v. United States, 354 U. S. 298 25

Statutes:

Federal Constitutional Provisions:

Article I, Section 10, U. S. Const. 2, 4, 19, 60
Article II, Section 1 58
Article VI 58
First Amendment, U. S. Const. ..... *passim*
Fifth Amendment, U. S. Const. 18, 59
Fourteenth Amendment, U. S. Const. 1, 4, 18, 46

PAGE

Federal Statutes:

18 U. S. C. § 2385 11

28 U. S. C. § 1253 2

28 U. S. C. § 1343 2

28 U. S. C. § 2201 2

28 U. S. C. § 2202 2

28 U. S. C. § 2281 2

28 U. S. C. § 2284 2

The Landrum-Griffin Act, 29 U. S. C. §§ 401-531 61

42 U. S. C. § 1983 2

State Constitutional Provisions, Statutes, Administrative Rules and Certificates:

Art. 1, § 6, Maryland Constitution 23

Art. 15, § 11, Maryland Constitution 8, 22, 23

Art. 37, Maryland Declaration of Rights 22

Ch. 721 of the Laws of Maryland of 1947 8

Senate Joint Resolution No. 2, 1948 Laws of Md. 158 (1948 extraordinary session) 8, 44

1949 Laws of Maryland 96-97 (Preamble to Art. 85A) 9, 44

§ 3(c), Art. 10, Md. Code Annot. (1957) 15

Art. 85A, Md. Code Annot. (1957) ..... *passim*

§ 435, Art. 27, Md. Code Annot. (1957) 30

PAGE

§ 439, Art. 27, Md. Code Annot. (1957) 30

"Certification of Applicant for Public Employment" *passim*

Rule Second, Rules Governing Registration of Law Students and Admission to the Bar of Maryland, 9A Md. Code Annot. p. 233 (1957) 15

Rule Fourteenth, Rules Governing Registration of Law Students and Admission to the Bar of Maryland, 9A Md. Code Annot. p. 233 (1957) 15

Ariz. Rev. Stat. § 38-231, subs. G, as amended 1961, Ch. 108, § 5 29

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PAGE

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PAGE

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IN THE

Supreme Court of the United States

October Term, 1967

No. 25

HOWARD JOSEPH WHITEHILL,

Appellant,

—v.—

WILSON ELKINS, President, University of Maryland, and the BOARD OF REGENTS, University of Maryland,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE APPELLANT

Opinions Below

The opinion of the United States District Court for the District of Maryland and the special concurrence of Judge Sobeloff were rendered on September 8, 1966, and are reported at 258 F. Supp. 589. The opinions and the judgment and final order in this case are also set out in the Record at pp. 63-78.

Jurisdiction

This class action was instituted on August 19, 1966 under the First Amendment and Section I of the Fourteenth Amendment of the Constitution of the United States, un-

der Article I, Section 10, Paragraph 1 of the Constitution of the United States; and under Sections 1343, 2201 and 2202 of Title 28 and Section 1983 of Title 42 and Sections 2281 and 2284 of Title 28 of the United States Code. The court below was asked to pass on the constitutionality of Article 85A of the MD. CODE ANNOT. (1957), the Subversive Activities Act of 1949, particularly Sections 1, 10, 11, 13, 17, and the "Certification of Applicant for Public Employment" required pursuant to it according to the interpretation of the certification requirement most recently made by the Attorney General of Maryland. The relief prayed for was an injunction against the Appellees, each of whom is either an official body or officer of the State of Maryland, from enforcing the statutes and rulings complained of, and, also "such other and further relief as to the Court may seem just and proper."

By decision filed on September 8, 1966, the District Court gave judgment for the Appellees and denied all relief requested by the Appellant. Notice of appeal was filed in the District Court for the District of Maryland on September 13, 1966. On November 15, 1966, the Jurisdictional Statement was filed in this Court and on February 13, 1967, this Court noted probable jurisdiction (R. 81).[1]

Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Keyishian* v. *Board of Regents of New York,* 385 U. S. 589; *Baggett* v. *Bullitt,* 377 U. S. 360; *Shelton* v. *Tucker,* 364 U. S. 479;

[1] Citations to the printed Record in this case henceforth will be in the form of (R. page number).

Florida Lime and Avocado Growers, Inc. v. *Jacobsen,* 362 U. S. 73. And see, *Sweezy* v. *New Hampshire,* 354 U. S. 234; *Speiser* v. *Randall,* 357 U. S. 513; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278.

Statutes, Certificates and Administrative Rulings Involved

The provisions of the law involved in this case are: Article 85A, Vol. 8A Md. Code Annot. pp. 4-10 (1957), the Maryland Subversive Activities Act of 1949, particularly Sections 1, 10, 11, 13, and 17; the "Certification of Applicant for Public Employment" required of Appellant; and the May, 1966 ruling of the Attorney General of Maryland as to the scope of the certification requirement. Because of their length, the text of the statutory provisions, certificates, and rulings, involved are set out in the Appendix, *infra,* pp. 2a-18a.

Questions Presented

1. In the light of recent decisions of this Court, was the District Court correct in ruling that the "Certification of Applicant for Public Employment," which Appellant refused to execute, and the Maryland Subversive Activities Act of 1949, which requires execution of that Certification as a condition of public employment and which otherwise erects loyalty requirements, are insulated from constitutional attack by this Court's decision in *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56 (1951)?

2. Are the "Certification" and the statute under which it is compelled unconstitutionally vague, uncertain and broad in violation of due process of law?

3. If the definitional, certification and other loyalty provisions of the Maryland statute are unconstitutionally vague, broad and indefinite, does the entire statute fall notwithstanding the inclusion in it of a standard severability clause?

4. Do Maryland's loyalty "Certification," which is indiscriminately required of all public employees and applicants for public employment, particularly of teachers, and the Maryland statute's loyalty provisions unconstitutionally infringe the freedoms of expression, belief, association and academic freedom in violation of the First and Fourteenth Amendments to the United States Constitution?

5. Do the Maryland statute and the "Certification" infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law?

6. Do the "Certification" and the statute pursuant to which it is required constitute a Bill of Attainder in violation of Article 1, § 10 of the United States Constitution?

Statement

A. *The Facts in This Suit*

This suit challenges the constitutionality of the Maryland Subversive Activities Act of 1949, Article 85A, Md. Code Annot. (1957), and particularly Sections 1, 10, 11, 13, 17, and the "Certification of Applicant for Public Employment" required pursuant to its provisions as a condition to public employment, and the ruling of the Attorney General of Maryland of May, 1966 which most recently interpreted the scope of this requirement.

Since in a motion to dismiss all facts well pleaded in the complaint are accepted as true, the facts in this case are as follows:

The Appellant herein, Howard Joseph Whitehill, Jr., is presently a resident of Chestertown, Maryland, and is engaged in teaching creative writing at the Johns Hopkins University in Baltimore and in writing works of fiction and of non-fiction. He is, furthermore, a practicing member of the Religious Society of Friends, known also as Quakers. The Appellees are Wilson Elkins, who is the President of the University of Maryland, and the Board of Regents of the University. They are fully and completely responsible for supervising, directing and otherwise controlling, so far as the University's personnel are concerned, the enforcement of the requirement under Sections 11 and 13 of Article 85A Md. Code Annot. (1957) that all applicants for employment with and all employees of the University execute as a condition to employment some certification of loyalty and particularly the "Certification of Applicant for Public Employment" that was required of Appellant (R. 5-6).

Pursuant to an understanding with representatives of the University of Maryland at College Park, Maryland, the Appellant executed a written contract for his appointment as a visiting lecturer in English during the academic year of 1966 to 1967. Under the terms of the contract, he was to be paid $7,000.00 on a ten month basis starting in September 1966; and he agreed to spend one day a week at the College Park campus each semester, teaching two creative writing classes in 75 minute sessions, and making additional conference time available for consultation with students (R. 5).

By a letter dated July 6, 1966, and signed by Dr. Murphy, the Appellant received the contract and certain additional papers, including what was denominated a "Certification of Applicant for Public Employment," which contained a loyalty test and which he was instructed had to be signed as a condition to his appointment (R. 5-6, 10-11). The Appellant executed the contract, and by letter of July 11, 1966, he mailed it to Dr. Murphy, declining in a separate letter enclosed therewith, however, to execute the "Certification." In his letter of explanation the Appellant offered to serve without pay pending the adjudication of the issues in this case (R. 6, 12, 60-62). Dr. Murphy by a letter of July 18, 1966, advised the Appellant that the University of Maryland would not accept his services without the required certification having been executed and filed by him (R. 6, 13-14).

On August 19, 1966, the Appellant filed suit in the United States District Court for the District of Maryland challenging the constitutionality, on the various grounds taken

up herein, of the Maryland Subversive Activities law and the required certification. In his complaint, the Appellant, whose teaching duties under the contract he had executed were not to commence for several weeks, requested a preliminary and permanent injunction, declaratory judgment, and "such other and further relief as to the Court may seem just and proper" (R. 9). A statutory three-Judge District Court was convened, and a hearing was conducted on September 1, 1966 on the State's motion to dismiss the complaint for failure to state a cause of action upon which relief could be granted. The State's motion was filed on August 31, 1966. On September 8, 1966, the District Court issued its order and opinion dismissing the complaint and resolving each of the constitutional issues the Appellant raised against him, primarily on the ground that this Court's 1951 decision in *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56, was controlling on the issues in this case even though, strictly speaking, *Gerende* directly involved only the candidates' oath requirement under Section 15, and not, as here, the employees' oath requirement under Sections 11 or 13 (R. 63-75). Judge Sobeloff, concurring specially, wrote a separate opinion in which he indicated his doubts as to the continued vitality of the *Gerende* decision, in the light of subsequent decisions of this Court, and in ending said "... despite the doubts engendered by the course of subsequent adjudications, I think the contentions made by the plaintiff here are more properly addressed to the Supreme Court. I am obliged, therefore, to join in today's order of dismissal rather than anticipate the abandonment of *Gerende*" (R. 77). Notice of Appeal was filed on September 13, 1966 (R. 78-81). On November 15, 1966, the Jurisdictional Statement was filed

in this Court and on February 13, 1967, this Court noted probable jurisdiction (R. 81).

B. *Factual Outline and History of Maryland's Subversive Activities Law*

By Chapter 721 of the LAWS OF MD. 1947, the General Assembly of Maryland proposed an amendment to the Constitution of Maryland by adding a new Section 11 to Article 15 thereof, which reads as follows:

> "No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any office, be it elective or appointive, or any other position of profit or trust in the Government of or in the administration of the business of this State or any county, municipality, or other political subdivision of this State."

The proposed amendment was approved by a vote of the people of Maryland on November 2, 1948.

At a special session of the General Assembly of Maryland in 1948, Senate Joint Resolution No. 2 was passed, see 1948 LAWS OF MD. 158 (1948 Extraordinary Session), directing the Governor to appoint a committee on subversive activities to study the laws of the United States, and of the several states, and to formulate and prepare a legislative program for the protection of democratic principles of government and ideals and for the exposure and expurgation of subversive activities in the State of Maryland. Pursuant to this resolution, the Governor appointed a "Commission on Subversive Activities," with Frank B.

Ober, Esquire, as chairman. The report of the commission, covering 115 pages, was submitted to the Governor on September 30, 1948, with an attached draft of a proposed bill entitled, "Sedition and Subversive Activities". The legislature enacted the substance and most of the detail of the bill proposed by the commission and it became Chapter 86 of the Acts of 1949, now codified as Article 85A of the ANNOTATED CODE OF MARYLAND (1957). By Chapter 310 of the LAWS OF MD. 1949, Chapter 86 was declared an emergency measure, and took effect on the date of its passage, April 22, 1949. On the background of the law, see Prendergast, *Maryland: The Ober Anti-Communist Law*, in THE STATES AND SUBVERSION 140 (Gellhorn ed. 1952). This law is popularly known as the "Ober Law" after the chairman of the Commission.

In a preamble to the Act, see 1949 LAWS OF MARYLAND 96-97, the General Assembly declared its findings, *inter alia*, that there existed a world-communist movement, under the domination of a foreign power, "having as its objective the establishment of totalitarian dictatorship in all parts of the world under its control"; that such dictatorship is "characterized by the liquidation of all political parties other than the Communist Party, the abolishment of free speech, free assembly and freedom of religion, and is a complete antithesis of the American constitutional form of government"; that other subversive organizations have similar objectives; that the methods of subversive persons and organizations "include treachery, deceit, infiltration into governmental, and other institutions, espionage, sabotage, terrorism, and other unlawful means"; that "the methods adopted by subversive persons and organizations render it imperative that the loyalty of persons

entering the public employment of the State of Maryland or any of its political sub-divisions be definitely established"; and that "the Communist movement plainly presents a clear and present danger to the United States Government and to the [government of the State of Maryland and their political subdivisions] . . ."

Although made up of nineteen sections, the Ober Act, Article 85A, is an integrated whole establishing a regulatory scheme to guard against "Sedition and Subversive Activities."

Section 1 of Article 85A, directly at issue in this case, sets forth the definitions which form the basis for the entire scheme. Defined therein are the terms "organization," "subversive organization,"[2] "foreign subversive organization,"[3] "foreign government," and "subversive person".[4]

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[2] "*'Subversive organization'* means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence."

[3] "*'Foreign subversive organization'* means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world fed-

Sections 2 through 9 all concern "Sedition," rather than "Loyalty" and have not been applied directly against the Appellant. These provisions, nevertheless, are relevant to this case and Appellant will contend under Point I. C., *infra*, that they too should fall. Section 2 makes it a felony "knowingly and willfully" to engage in certain defined "subversive" activities. Section 3 makes it a felony knowingly to remain or become a member of a "subversive organization". Section 4 disqualifies persons found guilty under Sections 2 or 3 from holding public office, standing for election, or voting in any election in Maryland. Section 5 declares unlawful and provides for the dissolution of "subversive organizations" and "foreign subversive organizations". At least so far as these provisions deal with subversion of the United States Government, it is clear that they have been superseded by the Smith Act, 18 U. S. C. § 2385. *Pennsylvania* v. *Nelson*, 350 U. S. 497. See also, Commentator's note to Section 2 of Art. 85A, MD. CODE ANNOT. (1957).

Sections 6 through 9 deal with the appointment of an Assistant Attorney General to be "in charge of subversive activities"; the collection of evidence and information with respect to "subversion" and appointment of additional per-

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erations, unions or governments to be effected through constitutional means."

"'*Subversive person*' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force or violence; *or who is a member of a subversive organization or a foreign subversive organization.*" (Emphasis supplied.)

sonnel for the task; the keeping of relevant records and reports, particularly "such records as may reflect on the loyalty of any resident of this State"; and the use of Grand Juries for purposes of inquiring into violations of the Article.

Sections 10 through 17 concern "Loyalty". Most of these provisions directly affect Appellant and inhibit the enjoyment of many of his most critical constitutional rights. Section 10 declares that "no subversive person, as defined in this article, shall be eligible for" public employment or appointment. Section 11 requires each governmental board, agency, or body which appoints, employs or supervises appointment or employment of public officials or employees to establish procedures for ascertaining that all such appointees or employees are not "subversive persons". "[T]eachers and other employees of any public educational institution in this State" are the only such appointees or employees given specific mention. In addition, the section provides that applicants "shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury". Section 12 authorizes employing authorities to dispense with "the inquiries prescribed in § 11; *other than the written statement to be executed by an applicant for employment* . . . as a prerequisite to the employment of any persons in the classification of laborers," upon a finding "that employment of persons as to whom there is reasonable cause to believe that they are subversive persons as defined in this article will not be dangerous to the health of the citizens or the security of the governments. . . ." (Emphasis supplied.)

Section 13 required every state employee employed as of June 1, 1949, "to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article". This quoted statement is then followed by the definition of "subversive person" given in Section 1. See *supra*, p. 11, note 4. The Section further provided that an employee who failed or refused "to execute such a statement or who admits he is a subversive person as defined in this article shall immediately be discharged". While earlier loyalty cards referred to Article 85A, without specification of a particular section, as their legislative authority, the "Certification of Applicant for Public Employment," demanded by the University officials in this case, states that it is required by this "Paragraph" 13 (R. 11). At the hearing below the Attorney General said that the loyalty certificates required by some other state agencies refer generally to Article 85A (R. 56). Authority for requiring the certification here at issue lies primarily under Section 11, but is also implied in Sections 12 and 13.

Section 14 provides that reasonable ground for believing a person is a "subversive person" is cause for discharge; it makes provision for administrative hearing and judicial review in such discharge cases. Section 15 requires candidates for election to any public office to file affidavits that they are not "subversive persons". Section 16 requires private institutions of learning receiving public funds to report on the procedures and efforts that they undertake to remain free of employees who are "subversive persons". Section 17 renders misstatements by public employees and applicants for public employment or appointment subject to statutory penalties of perjury. Section 18 is a standard

severability clause. Section 19 sets forth the short title of the Act.

Shortly after its passage, a number of suits were brought challenging the Ober Law on constitutional grounds. It was authoritatively construed by the Court of Appeals of Maryland and upheld against all constitutional attack. *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed,* 340 U. S. 881; *Gerende* v. *Board of Supervisors of Elections,* 197 Md. 282, 78 A. 2d 660 (1951), *aff'd per curiam,* 341 U. S. 56. See also *Hammond* v. *Lancaster,* 194 Md. 462, 71 A. 2d 474 (1950); *Hammond* v. *Frankfeld,* 194 Md. 487, 71 A. 2d 482 (1950). On the appeal in the *Gerende* case, which involved the affidavit required of candidates for public office, this Court affirmed, relying upon its interpretation of the Court of Appeals of Maryland's construction of the Maryland statute in *Shub.* Specifically, this Court said:

> "We read that decision to hold that to obtain a place on the Maryland ballot a candidate need only make an oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt. —— Md. at ——, 76 A. 2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirements. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is *affirmed.*" *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56-57.

Notably, until recently the Court's understanding in *Gerende* was not even closely followed by the long succession of Maryland Attorneys General.[5] Up to May, 1966, after this Court's decision in *Elfbrandt* v. *Russell*, 384 U. S. 11, the certification approved by the Attorneys General required the oath-taker to certify "that I am not a subversive person as defined by law, namely . . ." (followed by the Language approved in *Gerende*). (See R. 35.) An Applicant for public employment also had to certify that he understood that his statement was subject to statutory penalties of perjury. After the *Elfbrandt* decision, the At-

[5] At the hearing before the District Court in this case, it developed that various oaths, some very broad, were and still are extracted by various agencies of the State of Maryland and its political sub-divisions, presumably pursuant to Article 85A. (See R. 57.) See especially § 3(c) of Article 10, MD. CODE ANNOT. (1957) (Qualification for admission to the Bar); Rule Second, Rules Governing Registration of Law Student and Admission to the Bar of Maryland, 9A MD. CODE ANNOT., p. 233 (1957), which says: "The application [for registration as a law student] shall also state that the applicant is not a subversive person as defined by the Subversive Activities Act of 1949." (These rules were adopted by the Court of Appeals of Maryland on June 10, 1955 and amended on January 16, 1958 and July 21, 1965, long after this Court's decision in *Gerende*. Rule Fourteenth, governing admissions on motion, was last modified on December 22, 1966, well after the filing of this suit, without any change in this requirement. See Daily Record, Baltimore, Aug. 1, 1967, p. 6, col. 4.) All application forms and the forms of supporting documents conform to these requirements. See *Internal Security and Subversion: Principal State Laws and Cases, a Study Prepared by the American Law Division, Legislative Reference Service, Library of Congress for the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate*, 89th Cong., 1st Sess. 197-199 (1965). Incredibly, an applicant for admission on motion must certify whether he has "ever been a subversive person as defined . . ." according to precisely the definition found in Art. 85A, § 1, quoted *supra*, note 4, and, as taken up *infra* under point I. A., declared unconstitutional in *Baggett* v. *Bullitt*, 377 U. S. 360. See *Internal Security and Subversion*, *supra*, at 199.

torney General modified his prescribed form for the certification by deleting the phrases: (1) "that I am not a subversive person as defined by law, namely" and (2) "I am not knowingly a member of an organization engaged in such an attempt". See Append. p. 16a, *infra*. It is the post-May, 1966 oath that Appellant was required, and declined to take (R. 11).

Summary of Argument

I.

The "Certification of Applicant for Public Employment" and the Maryland Subversive Activities Act of 1949, Art. 85A, MD. CODE ANNOT. (1957), which requires its execution as a condition to public employment, are unconstitutionally vague, uncertain and broad in violation of due process of law.

A.

The "Certification" and the Subversive Activities Act are not protected from constitutional attack by this Court's decision in *Gerende* v. *Board of Election Supervisors*, 341 U. S. 56, which upheld Section 15 of the Act, requiring loyalty affidavits of candidates for state elected office, and upon which the District Court relied below. Subsequent decisions of this Court have destroyed the underpinnings of the *Gerende* decision and those of *Shub* v. *Simpson*, 196 Md. 177, 76 A. 2d 332 (1950), upon which this Court relied in *Gerende*. Furthermore, this Court's recent decisions reveal that not only the "Certification," which is subject to perjury sanctions, but also the loyalty and definitional provisions of the underlying statute must now be reviewed and declared unconstitutional. See *Elfbrandt* v. *Russell*, 384 U. S. 11, *Keyishian* v. *Board of Regents*, 385 U. S. 589.

B.

It is clear that central to Maryland's statute are the terms "subversive person" and "subversive organization," Section 1, Art. 85A, defined in precisely the same fashion as they were in the Washington loyalty oath statute and the Louisiana Subversive Activities Law, which were copied from Maryland's statute. This Court declared these definitions to be unconstitutionally vague in the cases of *Baggett* v. *Bullitt,* 377 U. S. 360 and *Dombrowski* v. *Pfister,* 380 U. S. 479, because men of common intelligence must guess at the law's meaning and differ as to its application. These two decisions govern the present case. Further, the Maryland loyalty provisions, and the "Certification" are also unconstitutionally broad in that they do not limit their disabilities to those who engage in advocacy of action to violently overthrow government or whose membership in organizations having the purpose of violently overthrowing or advocating action to violently overthrow the government is ". . . accompanied by specific intent to further the unlawful goals of the organization or . . . is . . . active membership . . . ." *Keyishian* v. *Board of Regents,* 385 U. S. 589, 608; *Elfbrandt* v. *Russell,* 384 U. S. 11.

C.

Even though the Maryland Subversive Activities Act contains a standard severability clause, see Section 18, Art. 85A, the definitional and loyalty provisions of the law, which are unconstitutionally vague, uncertain and broad, are completely intertwined with the remaining provisions and necessary for carrying out the legislative purposes of the Act. Under Maryland law concerning severability, the entire Act, therefore, must fall. See, *e.g.,*

Huebech v. *City of Baltimore,* 205 Md. 203, 107 A. 2d 99 (1954). And, it is incumbent upon this Court to decide the severability question according to state law, in a case, such as this one, which was litigated through the federal court system. See, *e.g., Reitz* v. *Mealey,* 314 U. S. 33, 38-39.

II.

All loyalty oaths, including Maryland's, that are indiscriminately required of all public employees and applicants for employment, are unconstitutional infringements of the First and Fourteenth Amendments' freedoms of expression, belief and association. And, when required of academic personnel, as Maryland's is, such oaths also violate academic freedom guaranteed by the First and Fourteenth Amendments. See *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603-604. These oaths may not be justified on the ground that they are conditions that may be imposed on the enjoyment of a privilege, public employment, that the state may withhold at its will; for this Court has rejected the principle "that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Keyishian* v. *Board of Regents,* 385 U. S. at 605. Across-the-board loyalty oaths must be judged according to the principles that "[w]here there is a significant encroachment upon personal liberty [particularly that protected by the First Amendment], the State may prevail only upon showing a subordinating interest which is compelling," *Bates* v. *Little Rock,* 361 U. S. 516, 524, and that repressive means of securing legitimate ends must fall if means less restrictive of First and Fifth Amendment rights are available. *Shelton* v. *Tucker,* 364 U. S. 479, 488; *Keyishian* v. *Board of Regents,* 385 U. S.

589, 609. When judged according to these standards, across-the-board loyalty oaths, and particularly Maryland's, must fall.

III.

The Maryland Subversive Activities Act and the "Certification" in question, afford an applicant for public employment who declines to execute the "Certification" no opportunity for a hearing, even for the purpose of explaining his reasons for not executing the "Certification" or of getting a clarification of the requirement. In addition, as with all such non-disloyalty disclaimers, the "Certification" otherwise shifts onto the applicant the burdens of proving his loyalty and lack of subversiveness. This oath presumes non-employability and then shifts onto applicants the task of understanding the complex statutory definitions of subversion and then, without any opportunity for hearing, requires them to make their declarations. The act and oath, therefore, are "at war with . . . the First Amendment," *Lamont* v. *Postmaster General,* 381 U. S. 301, 307, and deny procedural due process of law. Moreover, as the Court recently said in *Elfbrandt* v. *Russell,* 384 U. S. 11, 17-18: "The unconstitutionality of this Act follows *a fortiori* from *Speiser* v. *Randall,* 357 U. S. 513, where we held that a State may not even place on an applicant for a tax exemption the burden of proving that he is not engaged in criminal advocacy."

IV.

The "Certification" and the Maryland Subversive Activities Act constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution. Together, the test oath and statute punish the Appellant

and others similarly situated, legislatively and without a judicial determination. In this fashion they deny employment, a substantial interest, to competent and qualified employees and applicants for employment because they exercise their good consciences, professional integrity and political rights. See, *e.g., United States* v. *Brown,* 381 U. S. 437; *Cummings* v. *Missouri,* 71 U. S. (4 Wall.) 277; *Ex parte Garland,* 71 U. S. (4 Wall.) 333.

ARGUMENT

I.

The "Certification of Applicant for Public Employment" and the Maryland Subversive Activities Act of 1949, which requires its execution as a condition to public employment, are unconstitutionally vague, uncertain, and broad in violation of due process of law.

A. *Maryland's Law and the "Certification" are not protected from constitutional attack by this Court's 1951 decision in* Gerende v. Board of Supervisors of Elections.

Judge Winter for the majority in the District Court below said, ". . . what the Supreme Court said in the *Gerende* case is determinative here" (R. 69).[6] It is Appellant's

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[6] *But see* Isreal, *Elfbrandt* v. *Russell: The Demise of the Oath?* 1966 SUP. CT. REV. 193, 210, 210 n. 89 (Kurland ed.) (henceforth cited Isreal, *Demise,* 1966 SUP. CT. REV. 193) where it was observed that *Gerende* may be distinguishable on the ground that "the oath in *Gerende* was limited to officials with policy-making functions" or "that these officials [in *Gerende*] are elected." Professor Isreal, however, did not press the latter distinction and neither does Appellant who agrees that "there is nothing in the subsequent treatment of *Gerende* that indicates the Court considered this an im-

contention, however, that decisions of this Court subsequent to *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56, have destroyed the underpinnings of that case and if this Court has not yet done so it should reconsider and overrule that decision.

During the argument below in this case, Judge Winter made the following comment: "Of course, the Supreme Court of the United States said they read the Shub case as saying that only the shortened form of oath was required. I find it a little difficult to reach the same conclusion, reading the Shub case, just on my own . . . ." (R. 35). Appellant respectfully agrees that the *Shub* decision cannot properly be read to support the restrictive interpretation of the oath requirement that was urged upon this Court in *Gerende* by the Attorney General of Maryland. Alternatively, it is Appellant's position that the interpretation accepted by this Court in 1951 is much less limited than initially thought and, when judged by current standards, the statute and oath requirement as interpreted are unduly vague, uncertain and broad.

The Plaintiffs in *Shub* v. *Simpson*, 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed*, 340 U. S. 881 and *Gerende* v. *Board of Supervisors of Elections*, 197 Md. 282, 78 A. 2d 660 (1951), *aff'd per curiam*, 341 U. S. 56, sought to run for public office in Maryland without filing the affidavits of loyalty required by Section 15 of the Ober Law. In *Shub*, where the Maryland Court of Appeals rendered its only

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portant factor." *Ibid. But cf: Bond* v. *Floyd*, 385 U. S. 116. To the extent that the former distinction is relevant, see *Keyishian* v. *Board of Regents*, 385 U. S. 589, 607 (by implication), it is taken up in the discussion of the defect of over-breadth under points I. B. and II, *infra*.

full opinion considering the Ober Law on its merits, the main ground for attack was that the Section required an oath of office in addition to the one provided by the Maryland Constitution, and was, therefore, invalid under Article 37 of the Maryland Declaration of Rights which prohibits the legislature from prescribing additional oaths of office. The Maryland Court of Appeals, however, viewed Section 15 of the Act as requiring not an oath but merely an affidavit of qualification for office, implementing Article 15, Section 11 of the Maryland Constitution which reads: "No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any [public] office . . . ."[7] The plaintiffs in *Shub* contended that the affidavit required under Section 15 of the Act for candidates, identical to the oath prescribed in Section 13 for public employees, went far beyond Article 15, Section 11 of the Constitution, in that it encompassed committing, attempting to commit, advocating, abetting, or advising alteration of the government by peaceful revolution and also membership in foreign organizations the purposes of which are to overthrow or alter the government by means not involving force or violence.

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[7] Notably, the proposed Draft Constitution of Maryland's recent Constitutional Convention Commission does not include a provision that is equivalent to Article 15, Section 11, but does, in effect, carry-over Article 37 of the existing Declaration of Rights. See INTERIM REPORT OF CONSTITUTIONAL CONVENTION COMMISSION: MARYLAND—1967 (May 26, 1967) 211-212. But it is by no means clear that public employees are protected from the "Certification" requirement by Art. 37 of the current declaration of rights or by the proposed provision; nor is it clear from the Court of Appeals' decision in *Shub* that Art. 15, § 11 was necessary for the Ober Law to be valid under the State constitution. See *Shub* v. *Simpson*, 196 Md. 177, 187-189, 76 A. 2d 332, 336 (1950).

Upholding the legislation, the Maryland Court of Appeals stated its view, consistent with its understanding of the test of "clear and present danger," which had been refined recently by the federal Courts of Appeals, see 196 Md. at 195, 76 A. 2d at 340 that:

> *"A person who advocates the overthrow of the Government of the United States, or of this State, through force or violence* could scarcely in good faith, take the constitutional oath of office prescribed by Article 1, Sec. 6, and the Legislature has taken pains to see that the name of any such unqualified person shall not appear on the ballot." 196 Md. at 190, 76 A. 2d at 337 (Emphasis supplied).

The Court then specifically held that the purpose of Article 85A, the Ober Law, was identical with and therefore not inconsistent with that of Section 11 of Article 15 of the Maryland Constitution, which purpose the court said was "to prevent infiltration in our state, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence.*" *Shub* v. *Simpson,* 196 Md. 177, 192, 76 A. 2d 332, 338 (1950) (Emphasis in original).

Having reconciled the Ober Law to the Maryland Constitution, the Maryland Court of Appeals also addressed the federal Constitutional questions.

> "These grounds [said the court] are that it [Article 85A] abridges the fundamental rights of freedom of speech, press and assembly, that it is vague and indefinite and therefore violates due process, that it is a bill of attainder, that it attempts to establish guilt by associa-

tion, and other similar contentions. It is contended that the act is basically inseparable in its provisions, and, therefore, it should be stricken down in its entirety." 196 Md. at 195, 76 A. 2d at 339.[8]

Responding to these arguments, the court said that "[t]he purpose of Chapter 86 [Article 85A], as shown by its title and throughout its provisions, is not to restrict freedom of speech or thought, nor does it do so." 196 Md. at 192, 76 A. 2d at 338. And relying upon the federal Court of Appeals' decisions in *Dunne* v. *United States,* 138 F. 2d 137 (8th Cir. 1943), *cert. denied,* 320 U. S. 790 and *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), *aff'd,* 341 U. S. 494; and this Court's decision in *American Communications Association* v. *Douds,* 339 U. S. 382, the Maryland court concluded that:

"We do not think it necessary to repeat what has been said in these cases. *We are unable to find that the statute before us, on its face, violates any of the fundamental rights of appellants, or that it is susceptible of an interpretation which makes it necessary for the courts to strike it down.* On the contrary, there is a presumption in favor of its validity, and there has been presented to us no argument which impairs or rebuts that presumption." 196 Md. 177, 195, 76 A. 2d 332, 340. (Emphasis supplied.)

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[8] These various grounds were also pressed before this Court in *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. See Statement as to Jurisdiction, therein (No. 577, Oct. Term 1950); *Transcript of Record,* therein; *Brief of Appellant,* therein, *Brief of Appellee,* therein. *But see, Baggett* v. *Bullitt,* 377 U. S. 360, 368-69 n. 7.

It is evident from the Maryland Court of Appeals' opinion that that court was of the view that it had not, by judicial construction, significantly limited or narrowed the terms of the statute as they appear on its face. First, this is the most reasonable interpretation of the words, italicized above, chosen by the court to declare that neither on its face nor by interpretation did the statute violate the federal Constitution. Second, this conclusion is compelled by the fact that the statute was held to be directed at persons who advocate "the overthrow of the Government of the United States, or of this State, through force or violence . . . " 196 Md. at 190, 76 A. 2d at 337, and "persons who are engaged in *one way or another* in the attempt to overthrow the government *by force or violence,*" 196 Md. at 192, 76 A. 2d at 338 (first emphasis supplied), without limitation of the scope and coverage of the statute to advocacy of action to violently overthrow government or *active,* knowing membership, in organizations having the purpose of violently overthrowing or advocating action to violently overthrow the government, with specific intent to further these unlawful goals. See also, 196 Md. 177, 195, 76 A. 2d 332, 340 (1950), quoted *supra,* p. 24. Finally, this conclusion is made unmistakable by the Maryland court's reliance on the Circuit Court decision in *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), *aff'd,* 341 U. S. 494, and this Court's decision in *American Communications Association* v. *Douds,* 339 U. S. 382, the holdings of both of which have since been significantly limited by this Court. See, *e.g., Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States,* 367 U. S. 203; *Noto* v. *United States,* 367 U. S. 290; *United States* v. *Brown,* 381 U. S. 437. See particularly, *Baggett* v. *Bullitt,* 377 U. S. 360, 370 n. 8, where the Court said that in *Yates* it "made quite clear

exactly what all the above terms [of the Smith Act] do and do not proscribe: '[T]he Smith Act reaches only advocacy of action for overthrow of government by force and violence'"; *Keyishian* v. *Board of Regents,* 385 U. S. 589, 594-595, 599-600, 607-608; *Elfbrandt* v. *Russell,* 384 U. S. 11; *Aptheker* v. *Secretary of State,* 378 U. S. 500. Isreal, *Demise,* 1966 SUP. CT. REV. 193, 202.

This Court's most recent pronouncements make it quite clear that the *per curiam* decision in *Gerende,* based as it was on the decision of the Maryland Court of Appeals in *Shub,* does not bar re-consideration of Maryland's law and oath. *Keyishian* v. *Board of Regents,* 385 U. S. 589, is authority directly in point on this proposition. In *Keyishian* the State of New York argued that the Court was foreclosed from voiding various New York laws because of its earlier decision in *Adler* v. *Board of Education,* 342 U. S. 485, upholding some of these provisions. This Court, however, overruled New York's contentions on the grounds that, in *Adler,* it had not considered any challenge that the provisions in question were unconstitutionally vague and further that the Court had re-evaluated the constitutional doctrine of over-breadth and, consequently, had "since rejected the premises upon which" important aspects of the *Adler* decision "rested". 385 U. S. at 595, 606. In *Baggett* v. *Bullitt,* 377 U. S. 360, 368-369 n. 7, this Court similarly indicated that in *Gerende* it had not passed upon the contention that Maryland's statute was unconstitutionally vague. Moreover, just as the "constitutional doctrine[s] [have] developed since *Adler,*" 385 U. S. at 606, they have developed since *Gerende,* which preceded *Adler* by a year and which, as already noted and will be further elaborated, was based upon the same incorrect constitu-

tional doctrines. Further, as will be elaborated under Point II, *infra*, "constitutional doctrine which has emerged since that decision [*Adler*, but also *Gerende*] has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." *Keyishian* v. *Board of Regents*, 385 U. S. 589, 605. This premise has also been rejected with respect to the right of an elected official to hold office, the precise interest at issue in *Gerende*. See *Bond* v. *Floyd*, 385 U. S. 116.

Despite *Gerende*, therefore, this Court's recent decisions now require that the certification demanded of the Appellant should be reviewed and then invalidated. The Court's decisions also make it clear that this is true as well of Maryland's underlying statutory provisions bearing upon the "loyalty" of public employees.

In *Baggett* this Court reviewed and declared unconstitutionally vague and uncertain Washington's subversive activities law, particularly its definitions of "subversive person" and "subversive organization," and the loyalty oath required by it. The Washington law was copied from Maryland's Ober Law and its essential provisions were identical to it. Rev. Code Wash. Ann. ch. 9.81 (1961). See *Baggett* v. *Bullitt*, 377 U. S. 360, 362-64; *Id.* at 382 (Clark and Harlan, *JJ.*, dissenting).[9] *Baggett* came to this Court

[9] There is an exception, insignificant here. The Washington Law expressly declared the Communist Party to be a subvervsive organization, Rev. Code Wash. Ann. Sec. 9.81.083; 377 U. S. at 363 n. 1. The District Court in the case at bar also found that "the Washington definition [of subversive organization] included a limitation, absent in the Maryland definition, that membership be knowing." (R. 70). However, in *Gerende* this Court was evidently of the view that precisely that limitation was incorporated into the Maryland law. 341 U. S. 56-57.

on appeal from the decision of a statutory three judge District Court. 215 F. Supp. 439 (W. D. Wash. 1963). The District Court had construed the Washington Law and oath requirement in conformity with the construction of the similar Maryland statute in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950) and *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. See 215 F. Supp. at 446 n. 8, 447 n. 16, 449 n. 24, 450. Nevertheless, this Court, finding the statute too vague, struck it down.[10]

Justice Clark, joined by Justice Harlan, in dissent lamented the passing of *Gerende,* saying that it "is overruled. . . ." 377 U. S. at 382. Justice Clark elaborated:

> "It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in *Gerende,* but a review of the record in that case conclusively demonstrates to the contrary. Further, while the *Gerende* opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague." 377 U. S. at 382 note.

In apparent response to Justice Clark the majority said that *Gerende* had merely upheld Maryland's oath and not its underlying statute, 377 U. S. at 368-69 n. 7. But as the Court held two years ago in *Elfbrandt* v. *Russell,* 384 U. S.

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[10] The Court said: "Appellants contend in this Court that the oath requirements and the statutory provisions on which they are based are invalid on their face because their language is unduly vague, uncertain and broad. We agree with this contention. . . ." 377 U. S. at 366.

11, a loyalty oath, no matter how innocuous on its face,[11] cannot be passed upon in isolation, and it must be read together with its underlying and authorizing statute. See also *Dombrowski* v. *Pfister,* 380 U. S. 479, 493-94 (1965).[12]

The point that the Maryland oath must be read and passed upon with the underlying statute is further illuminated when note is taken of the fact that on the "Certification of Applicant for Public Employment," now administered by the Appellees, is printed, "Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)," (R. 11). The conscientious person who, himself or by counsel, refers to and reads the authorizing law is confronted squarely with the statutory terms and definitions that in *Baggett* this Court declared unconstitutionally

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[11] The Oath in *Elfbrandt* was in the following form:

"'State of Arizona, County of ——— I, ———————
(type or print name)
do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of ——— (name of office) ——— according to the best of my ability, so help me God (or so I do affirm).' Ariz. R. Stats. § 38-231, subs. G, as amended Laws 1961, Ch. 108, § 5." *Elfbrandt* v. *Russell,* 97 Ariz. 140, 397 P. 2d 944, 945 n. 2 (1965). Evidently, "the Arizona provision is also based on Maryland's widely copied 'Ober Act.'" Isreal, *Demise,* 1966 SUP. CT. REV. 193 n. 3.

[12] The Court there said: "The statutory definition of a 'subversive organization' . . . incorporated into the offense [under Louisiana law] . . . is substantially identical to that of the Washington statute which we considered in *Baggett* v. *Bullitt,* 377 U. S. at 362, 363 n. 1. *There the definition was used in a state statute requiring state employees to take an oath as a condition of employment. We held that the definition, as well as the oath based thereon, denied due process because it was unduly vague, uncertain and broad.*" 380 U. S. at 493-94. (Emphasis supplied.)

vague, uncertain and broad on their faces. The oath in *Elfbrandt* v. *Russell,* 384 U. S. 11, quoted *supra* in note 11, contained a similar citation to the underlying Arizona statute. And with this as the only visible nexus between the oath and the statute, this Court would not read and pass upon the oath without the statute.

The Maryland certification has an additional nexus between the oath and the statute, not apparent on the face of the Arizona oath. It requires affiants to make the statement that: "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)" (R. 11). As Judge Sobeloff said below in his special concurrence, "I am inclined to agree with the plaintiff that the prescribed oath or statement is not to be judged in isolation, but in conjunction with the statute, *for in the absence of a statute, there would be no authority for demanding any statement 'under penalty of perjury'*" (R. 75). (Emphasis supplied.)[13] See also, *Georgia Conf. of AAUP* v. *Board of Regents,* 246 F. Supp. 553, 555 (N. D. Ga., 1965) (Three Judge Court).

Further, it was never merely Maryland's certification that the Appellant contested. From the outset he contended that "[n]ot only the required 'Certification of Applicant for Public Employment' but also the statute, particularly . . . [Sections 1, 10, 11, 13 and 17], pursuant

[13] Article 85A, Section 17, expressly provides that the penalties of perjury shall apply to "[e]very written statement made pursuant to this article by an applicant for appointment or employment." Sections 11, 13 and 17 specifically provide that such statements "shall contain notice that [they are] subject to the penalties of perjury." Statutory perjury is defined by Section 435 of Article 27 of the MD. CODE ANNOT. (1957).

to which such certification is given, is unconstitutional" (R. 25). In these circumstances, the Appellant would have standing to challenge the Maryland statute even if there were an administrative decision to dispense with requiring the particular certification in question. In *Keyishian* v. *Board of Regents,* 385 U. S. 589, each of the appellants brought suit after notification "that his failure to sign the [Feinberg] certificate [demanded of him] would require his dismissal." 385 U. S. at 592.[14] The Court observed that shortly before the trial in *Keyishian,* "The Feinberg Certificate was rescinded and it was announced that no person then employed would be deemed ineligible for continued employment 'solely' because he refused to sign the certificate." 385 U. S. at 596. Nevertheless, the Court held that:

> "The change in procedure in no wise moots appellants' constitutional questions raised in the context of their refusal to sign the now abandoned Feinberg Certificate. The substance of the statutory and regulatory complex remains and from the outset appellants' basic claim has been that they are aggrieved by its application." 385 U. S. at 596.

So it is with the basic claim of Appellant now before the Court, to whose case the *Keyishian* ruling squarely applies.

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[14] The Court will recall, as in this case, the appellees then took steps to implement the notification. *Ibid.*

B. *Under long standing constitutional principle and recent decisions of this Court declaring unconstitutionally vague, uncertain and broad statutes of other states that were virtually identical to the Maryland Subversive Activities Act, particularly with respect to definitions, Maryland's statute is unconstitutionally vague, uncertain and broad on its face, as applied, and as judicially construed, and both it and the required "Certification" are therefore invalid conditions or limitations on public employment.*

No principles of due process are better established than those which deny government the power: (1) to enforce "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Baggett* v. *Bullitt,* 377 U. S. 360, 367; see also *e.g., Cramp* v. *Board of Public Instruction,* 368 U. S. 278; *Winters* v. *New York,* 333 U. S. 507; *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Connally* v. *General Construction Co.,* 269 U. S. 385, or (2) to enforce a law that has "an overbroad sweep," proscribing acts "which may not be proscribed" as well as acts "which legitimately may be proscribed." *Keyishian* v. *Board of Regents,* 385 U. S. 589, 609; see also, *e.g., Elfbrandt* v. *Russell,* 384 U. S. 11; *Aptheker* v. *Secretary of State,* 378 U. S. 500. It is also well settled that these principles are most strictly applied to statutes having a potentially inhibiting effect on speech, for fear that "the free dissemination of ideas may be the loser". *Smith* v. *California,* 361 U. S. 147, 151 (vagueness); *accord, Keyishian* v. *Board of Regents,* 385 U. S. 589, 609 (overbreadth). Further, in recent years this Court has expressly and consistently ruled that when loyalty oaths, and the statutes pursuant to which they are made conditions to public office or employment, are unduly vague, uncertain and broad, they inhibit con-

stitutionally protected expression, belief, association and academic freedom and are therefore invalid. *Elfbrandt* v. *Russell*, 384 U. S. 11; *Keyishian* v. *Board of Regents*, 385 U. S. 589; *Baggett* v. *Bullitt*, 377 U. S. 360; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; see *Morris, Baggett* v. *Bullitt: Scienter & "Guiltless Knowing Behavior"*, 1 LAW IN TRANSITION Q. 185 (1964).[15] These decisions are squarely in point with the present case and, Appellant respectfully submits, they require that Maryland's certification and Statute be declared unconstitutional.

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[15] With near unanimity during the last two years numerous state and inferior federal courts have also voided loyalty requirements, imposed on teachers or other academic personnel, on these or similar grounds. See *Heckler* v. *Shephard*, 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge Court); *Georgia Conf. of AAUP* v. *Board of Regents*, 246 F. Supp. 553 (N. D. Ga. 1965) (Three Judge Court); *Brush* v. *State Board of Higher Education*, —— Ore. ——, 422 P. 2d 268 (1966); *Pedlosky* v. *Massachusetts Institute of Technology*, —— Mass. ——, 224 N. E. 2d 414 (1967); *Opinion of the Justices*, —— N. H. ——, 228 A. 2d 165 (1967); *Spangler* v. *Board of Regents*, Docket 241, D. Ct., Lancaster Cty., Neb., April 17, 1967, reprinted in Appendix, *infra*, at pp. 24a-26a; *Gallagher* v. *Smiley*, Civ. No. 66-C-608, U. S. D. Ct. Colo. April 24, 1967 (Three Judge), reprinted in Appendix, *infra*, at pp. 27a-30a; N. Y. Times, July 16, 1967, Sec. 1, p. 37, col. 5 (Texas oath for students, superseded by 1953 law, suit filed against that law); see also, *Hurwitz* v. *Directors Guild*, 364 F. 2d 67 (2d Cir.) *cert. denied*, 385 U. S. 971 (1966) (union's loyalty oath voided); *Reed* v. *Gardner*, 261 F. Supp. 87 (C. D. Calif. 1966) (Three Judge) (Medicare oath declared unconstitutional); *Weiss* v. *Gardner*, 386 U. S. 9 (1967), *vacating and remanding for dismissal as moot*, 263 F. Supp. 186 (S. D. N. Y. 1966) (Three Judge), upon the Solicitor General's representation that the government was not appealing from the injunction issued in *Reed, supra*, because of this Court's decision in *Elfbrandt; contra, Knight* v. *Board of Regents*, —— F. Supp. ——, 35 U. S. L. W. 2774 (S. D. N. Y. June 2, 1967) (Three Judge). For the Court's convenience, included in the Appendix, *infra*, pp. 19a-23a, is an annotated "Compilation of State Loyalty Standards for Teachers," which reveals the pervasiveness of these kinds of laws and requirements.

As pointed out earlier, the essential definitional and loyalty provisions of the subversive activities law of the State of Washington, declared unconstitutionally vague and uncertain in *Baggett* v. *Bullitt*, 377 U. S. 360, 367-370 are identical with and were in fact copied from Maryland's Ober Law. See also, *Keyishian* v. *Board of Regents*, 385 U. S. 589, 597-604; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Dombrowski* v. *Pfister*, 380 U. S. 479. Maryland's loyalty and definitional provisions, therefore, are also unconstitutionally vague.

Recently the Court also voided Arizona's loyalty oath for public employees and its accompanying statutory gloss, which applied criminal sanctions to mere knowing membership in an organization having as one of its purposes the violent overthrow of government. The Arizona scheme's defect was that it was overly broad, impinging on constitutionally protected freedoms of expression and association, for it applied even "to membership without the 'specific intent' to further the illegal aims of the organization . . ." *Elfbrandt* v. *Russell*, 384 U. S. 11, 19. See also *Aptheker* v. *Secretary of State*, 378 U. S. 500; *compare*, *Noto* v. *United States*, 367 U. S. 290, *with*, *Scales* v. *United States*, 367 U. S. 203; *cf. Gibson* v. *Florida Legislative Committee*, 372 U. S. 539, 543-46; *Shelton* v. *Tucker*, 364 U. S. 479. In its most recent decision in this area, the Court held that the defect of overbreadth involved constitutional deprivation regardless of whether the sanction applied by the government was direct (criminal) or indirect (withholding of a benefit or interest). In *Keyishian* v. *Board of Regents*, the Court declared several provisions of New York Education and Civil Service Laws because of overbreadth and held that:

> "*Elfbrandt* and *Aptheker* state the governing standard: legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations." 385 U. S. 589, 607-608.

The same defect, overbreadth, resides in the Maryland statute, which erects both direct and indirect sanctions, as judicially construed in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950) and *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. See Article 85A, Sections 1, 3, 10, 11, 13, 14 and 15 of the MD. CODE ANNOT. (1957).

The defects of overbreadth and vagueness are made particularly clear by the fact that in *Shub,* the Maryland Court of Appeals, expressly relied on the Second Circuit decision in *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), without the limiting clarification provided by subsequent decisions of this Court.[16] The Maryland court thus ruled that the Maryland statute covers those who advocate "the overthrow of the Government of the United States, or of this State, through force or violence . . . ," 196 Md. at 190, 76 A. 2d at 337, without restricting coverage to advocacy of action to violently overthrow government, or *active* knowing membership, in organizations having the purpose of violently overthrowing or advocating action to violently overthrow the government, with specific intent to further

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[16] See, *e.g., Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States,* 367 U. S. 203; *Noto* v. *United States,* 367 U. S. 290; *Baggett* v. *Bullitt,* 377 U. S. 360, 370 n. 8; see also Isreal, *Demise,* 1966 SUP. CT. REV. 193, 202, 211 n. 90.

these unlawful goals.[17] And this Court evidently recognized and approved the overly broad interpretation, by ruling acceptable the oath proffered by the Attorney General of Maryland, according to which the affiant attested that he was not "knowingly a member of an organization engaged in such an attempt". *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. at 57. The Court thereby approved an oath and statute that are invalid under current standards for they are "not restricted in scope to those who join [such an organization] with the 'specific intent' to further its illegal action . . ." *Elfbrandt* v. *Russell,* 384 U. S. 11, 17; *Keyishian* v. *Board of Regents,* 385 U. S. 589, 607-608. Moreover the Court thereby approved an oath and statute that, under current standards, suffers the "defect of vagueness," for they are "plainly susceptible of sweeping and improper application. [They] may well prohibit the employment of one who merely advocates the doctrine [of forceful overthrow of government] in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims." *Keyishian* v. *Board of Regents,* 385 U. S. 589, 599-600.

"Out of an abundance of caution," (R. 38), according to the Attorney General of Maryland, immediately following the *Elfbrandt* decision, he deleted from the oath administered to applicants for positions with the University, the phrase "knowingly a member of an organization engaged in such an attempt". See Appendix, *infra,* pp. 17a-

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[17] Professor Isreal accurately observed that: "there was nothing in the opinion of the Maryland Court of Appeals to suggest that a requirement of 'specific intent' has been read into the state statute." Isreal, *Demise,* 1966 Sup. Ct. Rev. 193, 210 n. 88.

18a. This deletion, compelled by *Elfbrandt*,[18] however, was to no avail; for the oath and the statute are still trapped between the rock of overbreadth and the whirlpool of vagueness.

The affiant is still required to certify that he is "not engaged in *one way or another* in the attempt to overthrow the Government . . . " (R. 11). (Emphasis supplied.) The emphasized phrase, also approved by this Court in *Gerende*, 341 U. S. 56, however is not self-defining. In fact, to determine what it means, one must turn to the authorizing statute and its judicial interpretation, for without a defining gloss, the phrase unquestionably suffers from just the defect of vagueness the Court found unconstitutional in *Baggett* v. *Bullitt*, 377 U. S. 360, 366-70 (1964),[19] and just the defect of breadth struck down in *Elfbrandt* v. *Russell*,

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[18] One commentator observed that:

> "This oath, even though narrowly construed by the Maryland supreme [sic] court does not meet the requirements of the [*Elfbrandt*] Concept. It does not distinguish between types of memberships. It is true that the construction of the oath . . . does not limit it to those though being knowledgeable have some 'meaningful association' with the aims and activities of the 'subversive' organization."

Leahy, *Loyalty and the First Amendment—A Concept Emerges*, 43 N. D. L. Rev. 53, 74 (1966); see also Isreal, *Demise*, 1966 Sup. Ct. Rev. 193, 193 n. 3, 209-11, 238-39.

[19] It is noteworthy that in *Baggett* v. *Bullitt*, 377 U. S. 360, 368-69 n. 7, the Court left this phrase out when it quoted the terms of the oath that it said had been found to be acceptable in *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56-57. As a matter of fact, in *Gerende*, the Court, quoting from the decision of the Court of Appeals of Maryland, included precisely this phrase in what the Court found to be the "acceptable" affidavit.

384 U. S. 11 and *Aptheker* v. *Secretary of State*, 378 U. S. 500, 510-14.[20]

But the statute and the judicial construction that has been placed upon it, do not sufficiently clarify the meaning of the phrase.[21] Quite the contrary, when, for example, asked by Judge Winter at the hearing below, the only definition the Attorney General of Maryland could put on the phrase "in one way or another," was to say:

> "I think it probably means in any way, or by any available means. I think it means in one way or another, precisely what it says. It's unfortunate that the English language lacks the precision which perhaps we might like it to have, but I think it means just that: In one way or the other, in any way" (R. 41).

Appellant submits that if the phrase means anything less expansive than this circular and unconstitutionally vague definition, it could only mean advocating "the overthrow of the Government . . . through force or violence . . ." *Shub* v. *Simpson*, 196 Md. 177, 190, 76 A. 2d 332, 337, without limitation to advocacy of action to violently overthrow government or *active*, knowing membership with specific intent to

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[20] See Isreal, *Demise*, 1966 SUP. CT. REV. 193, 210-211: "The oath applies to attempts 'in one way or another' to overthrow the government, and this might well require no more than advocacy itself, especially when it is remembered that the concept of advocacy used in this area is that of urging future action in language 'reasonably and ordinarily calculated to incite to such action.'"

[21] *Compare Keyishian* v. *Board of Regents*, 385 U. S. 589, 601: "We do not have the benefit of a judicial gloss by the New York Courts enlightening us as to the scope of this complicated scheme." Nevertheless, "This is not a case where abstention pending state court interpretation would be appropriate, *Baggett* v. *Bullitt* [377 U. S. 360], 375-379; *Dombrowski* v. *Pfister*, 380 U. S. 479, 489-490." *Id.* 385 U. S. at 601 n. 9.

further unlawful ends, and it is therefore still unconstitutionally broad and vague.[22]

Even assuming that the recent deletion from the Maryland oath is meaningful, and, also, that under Section 11 of Article 85A, the Attorney General had the authority to eliminate from the oath the phrase "knowingly a member of an organization engaged in such an attempt" and also has the authority to delete the phrase "in one way or another," it is Appellant's contention that the oath would still have to fail.[23] For, as discussed above, the recent decisions of this Court make it clear that the oath must be read and passed upon with its underlying and authorizing statute. Although the oath may possibly be within his control, the Attorney General has no authority to change the meaning of the judicially construed statute. As Justice Frankfurter said during the very term in which *Gerende* was decided:

> "The Attorney General did not give this assurance [in *Gerende*] as a matter of personal relaxation of a legal

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[22] The failure of the *Shub* and *Gerende* decisions to clarify the meaning of the Maryland statute can further be seen in the fact that those administering the oath requirement have been unable to settle on a particular and clear certification. Until recently even the oath approved by the Attorney General to be required of applicants for public employment was cast in terms that were much broader than those found acceptable by this Court in *Gerende*. Further, broad pre-*Gerende* oaths are still required under some Maryland laws and by many government departments and subdivisions of Maryland. See, *e.g.*, note 5, *supra*. Notably, despite the Maryland court's ruling in *Shub* that they are not subject to the Ober Law, candidates for federal office were still being asked to execute a "loyalty" certification. See N. Y. Times, p. 60, col. 1, May 1, 1966.

[23] The Attorney General probably cannot lawfully recommend that the oath not be prescribed at all. Although Section 11 appears to vest discretion in the employing agency to decide whether to extract an oath, Sections 12 and 13 indicate that a "written statement," certification or oath must be extracted as a condition of employment. *Cf. Sweezy* v. *New Hampshire*, 354 U. S. 234.

requirement. He was able to give it on the basis of the interpretation that the Court of Appeals of Maryland, the highest court of that State, had placed upon the legislation." *Garner* v. *Board of Public Works,* 341 U. S. 716, 727 (Frankfurter, J. concurring).[24]

And when penalties of perjury are provided to enforce oath taking requirements, this Court has made it clear that the fact that the oath itself might be innocuous on its face will not insulate it from examination in the context of the statute authorizing it and providing penalties for its enforcement. *Elfbrandt* v. *Russell,* 384 U. S. 11.

Moreover, when penalties of perjury are provided, the Court has recently said that it will not rely on the fair-mindedness of prosecutors to limit otherwise unduly vague, uncertain and broad statutes requiring oaths, *e.g., Baggett* v. *Bullitt,* 377 U. S. 360 at 373-74; *Elfbrandt* v. *Russell,* 384 U. S. 11; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278, 286-287, or otherwise impinging First Amendment rights, including academic freedom, see *Keyishian* v. *Board of Regents,* 385 U. S. 589, 599-600; see also, *Dombrowski* v. *Pfister,* 380 U. S. 479, 488-94. And as the Court said in *Aptheker* v. *Secretary of State,* 378 U. S. 500, 515, 517, the fact that a statute having an inhibiting effect upon First Amendment and other essential personal rights may have been constitutionally applied in the particular case does not insulate it from attack on its face. See also *Thornhill* v. *Alabama,* 310 U. S. 88, 97-98; *NAACP* v. *Button,* 371 U. S. 415, 432-33.

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[24] In *Georgia Conf. of AAUP* v. *Board of Regents,* 246 F. Supp. 553, 555 (N. D. Ga. 1965) the three judge court said: "The oath which the State School Superintendent has substituted for the oath prescribed in the 1935 statute has not been objected to by plaintiffs, but we say in passing that it seems to be without statutory basis."

To recapitulate, under the standards of unconstitutionality for vagueness and overbreadth refined in the Court's most recent decisions in this area, Maryland's Ober oath and many provisions of the underlying statute, which " . . . blankets all state employees, regardless of the 'sensitivity' of their positions," *Keyishian* v. *Board of Regents,* 385 U. S. 589, 607; *compare Bond* v. *Floyd,* 385 U. S. 116, impinge substantially upon the academic and other First Amendment freedoms of the Appellant and the members of the class he represents. *Keyishian* v. *Board of Regents,* 385 U. S. 589. The statute and the "Certification," therefore, are and should be declared unconstitutional. First in the light of the four cases specifically dealing with such oaths and loyalty statutes,[25] the Maryland oath both standing on its own and when read with its underlying statutory gloss, is both unconstitutionally vague and broad. Second, the applicable loyalty provisions, Sections 10,[26] 11,[27] 12,[28] 13,[29] 14,[30] and 17,[31] which together with the oath and definitional provisions, constitute the complex regulatory scheme impinging directly on Appellant's rights, see *Keyishian* v.

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[25] *Keyishian* v. *Board of Regents,* 385 U. S. 589; *Elfbrandt* v. *Russell,* 384 U. S. 11; *Baggett* v. *Bullitt,* 377 U. S. 360; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278.

[26] entitled: "Subversive person not eligible for governmental office." Appendix, *infra,* p. 10a.

[27] entitled: "Rules and regulations to determine loyalty—in general." Appendix, *infra,* pp. 10a-11a.

[28] entitled: "Same—Not applicable to laborers." Appendix, *infra,* p. 11a.

[29] entitled: "Statement of employees." Appendix, *infra,* pp. 11a-12a.

[30] entitled: "Discharge from office." Appendix, *infra,* pp. 12a-14a.

[31] entitled: "False statements constitute perjury." Appendix, *infra,* p. 15a.

Board of Regents, 385 U. S. 589, are all cast in the operative terms "subversive person" and "subversive organization". Those terms are defined in Section 1, see footnotes 2, 3, 4, *supra,* in precisely the same language that was declared to be unconstitutionally vague in *Baggett* v. *Bullitt,* 377 U. S. 360 and *Dombrowski* v. *Pfister,* 380 U. S. 479. Consequently, each of these provisions, as well as the definitions upon which each is founded, is unconstitutionally vague. Furthermore, since the term "subversive person" contemplates membership in "a subversive organization or a foreign subversive organization," see note 4, *supra,* without limitation to active membership or membership with specific intent to further the organizations' unlawful goals, the definitions and all of the other provisions are also unconstitutionally broad. *Keyishian* v. *Board of Regents,* 385 U. S. 589; *Elfbrandt* v. *Russell,* 384 U. S. 11.

C. *The definitional, oath and loyalty provisions of Article 85A being unconstitutionally vague, uncertain and broad, the entire statute must fall notwithstanding the inclusion in it of a standard severability clause.*

Despite Section 18, of Article 85A, the severability provision in Maryland's Subversive Activities Law, the entire statute must fall. It is well established that severability clauses are to no avail when the valid and invalid portions of a statute are so inextricably intertwined, connected and interdependent in subject matter and purpose as to preclude the presumption that the legislature would have passed one portion without the others. On the contrary, when the provisions of a statute are so interrelated the conclusion is compelled that the legislature would not have done so. See, SUTHERLAND, STATUTORY CONSTRUCTION, Sections 2418, 2407, 2404 (3rd Ed., 1943). This is especially

true of statutes embodying criminal or penal provisions. See SUTHERLAND, *supra*, Section 2418.

The Maryland Court of Appeals has stated the test of severability in a number of alternative forms, involving the above-mentioned considerations. First, the test is: "... one of legislative purpose, namely: would the [legislature] have enacted the ... law if it had been aware that the ... [particular] provisions were invalid?" *Heubeck* v. *City of Baltimore*, 205 Md. 203, 211, 107 A. 2d 99, 104 (1954); see also *National Can Corp.* v. *State Tax Com'n*, 220 Md. 418, 153 A. 2d 287, 298 (1959). Second, it requires that an entire statutory scheme be struck down when elimination of some provisions render the other provisions "impractical and useless without the invalid portions". *Heubeck* v. *City of Baltimore*, 205 Md. 203, 211, 107 A. 2d 99, 104 (1954). Third, the court asks the question whether the invalid provision "... is so interwoven with the entire Act that the [remaining] provisions ... cannot stand without it." *National Can Corp.* v. *State Tax Com'n*, 220 Md. 418, 436, 153 A. 2d 287, 298 (1959). The federal tests of severability are precisely the same. See, *e.g.*, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 312 *et seq.*; *Railroad Retirement Board* v. *Alton R. R.*, 295 U. S. 330, 361-362.

When, in the course of reviewing decisions of state courts, the Court declares a state provision unconstitutional, it customarily remands to the state court for determinations of severability. See *Bell* v. *Maryland*, 378 U. S. 226, 240-241; *Skinner* v. *Oklahoma*, 316 U. S. 535, 543; *Dorchy* v. *Kansas*, 264 U. S. 286, 289-91. However, even when reviewing state court decisions this Court has consistently declared that "in the absence of a controlling state decision, [it] may, in passing upon the claim under federal

law, decide also the question of severability. But it is not obliged to do so." *Dorchy* v. *Kansas,* 264 U. S. 286, 291, quoted with approval in *Bell* v. *Maryland,* 378 U. S. 226, 240. On the other hand, "In cases coming from the lower federal courts, such questions of severability, must be determined by this Court," *Dorchy* v. *Kansas,* 264 U. S. 286, 291; *Williams* v. *Standard Oil of Louisiana,* 278 U. S. 235, by applying the severability rules of the state. See, *e.g., Reitz* v. *Mealey,* 314 U. S. 33, 38-39; *In re Wisconsin Builders Supply Co.,* 239 F. 2d 649, 656-657 (7th Cir. 1956); *Commerce Oil Refining Corp.* v. *Minor,* 170 F. Supp. 396, 405 (D. R. I. 1959), applying the *Heubeck* formula. It is, therefore, appropriate for this Court to resolve the severability question posed in this case. The issue being a purely legal one of legislative purpose, nothing would be gained by remanding the case to the federal district court for disposition.

When the appropriate federal and state tests of severability are applied to Art. 85A, it is clear that the entire statute must fall. Article 85A is a unified scheme comprised of interdependent provisions, including criminal and penal ones, to control subversive activities in Maryland. See "Statement B. Factual Outline and History of Maryland's Subversive Activities Law," *supra,* pp. 8-16; Maryland Senate Joint Resolution No. 2, Special Session, 1948 Laws of Maryland 158 (1948 Extraordinary Session); Report of the Commission on Subversive Activities to Governor William Preston Lane, Jr., and the Maryland General Assembly (January, 1949); 1949 Laws of Maryland 96, *et seq.* (setting forth the Act's preamble); see also, Prendergast, *Maryland: The Ober Anti-Communist Law,* in The States and Subversion 140 (Gellhorn, ed. 1952). As elaborated under Point I. B. of the

Argument, *supra*, Section 1, the definitions section, and Sections 10-14, and 17, which impose the certification and loyalty requirements on the Appellant and the others in the class he represents, are unconstitutionally vague, uncertain and broad. The definitions section, however, is at the heart of Maryland's statutory scheme; for the remaining significant provisions all depend on and make reference to these definitions, which constitute a major constitutional defect. See Sections 2(d), (e),[32] 3, 4, 5, 6, 9, 14, 15, 16. Once Section 1 is struck down, there is very little of the interwoven statute than can possibly avoid infection. Certainly, so little would be left that the Legislature would not "have enacted the law if it had been aware that the . . . [tainted] provisions were invalid." *Heubeck* v. *City of Baltimore*, 205 Md. 203, 211-12, 107 A. 2d 99, 104 (1954). See also, *Pedlosky* v. *Massachusetts Institute of Technology*, —— Mass. ——, 224 N. E. 2d 414, 416 (1967), where the Supreme Judicial Court of Massachusetts, ruling a loyalty oath, and the entire statute that provided for it, invalid, held: "We have no way of knowing whether the Legislature would have enacted c. 71, §30A without the provision which we conclude to be invalid. We are unable to decide that these provisions are separable."

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[32] Much of what remains in Section 2, pertaining to seditious offenses, is preempted under this Court's decision in *Pennsylvania* v. *Nelson*, 350 U. S. 497; see commentator's note to Section 2 of Art. 85A, Md. Code Annot. (1957). Moreover, this Court has ruled that the word "sedition," which is used to entitle and describe Sections 2 through 9 of Art. 85A, Md. Code Annot. (1957), is unconstitutionally vague. *Keyishian* v. *Board of Regents*, 385 U. S. 589, 597-600.

II.

Loyalty oaths and provisions, including Maryland's, that are indiscriminately required of or imposed upon all public employees and applicants for public employment, particularly teachers, are unconstitutional infringements on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution.

The indiscriminate requirement of a loyalty oath as a condition of public employment violates the due process clause of the Fourteenth Amendment and through it the First Amendment to the United States Constitution by unduly infringing upon the protected freedoms of expression, conscience, belief, religion, association, and academic freedom. See *Keyishian* v. *Board of Regents,* 385 U. S. 589, 607; *compare Bond* v. *Floyd,* 385 U. S. 116.

The case at bar differs fundamentally from most past cases decided by this Court dealing with related areas. One significant distinction is that this case does not involve any orderly inquiry or questioning by state officials seeking relevant information.[33] The Appellant has not been asked to specify, particularize, elaborate, discuss or

[33] It requires no elaboration that there are limitations, in the interest of the First Amendment, on even this kind of state activity, see *Keyishian* v. *Board of Regents,* 385 U. S. 589, 608, and that repressive means of securing legitimate ends must fall if means less restrictive of First Amendment interests are available. See *Shelton* v. *Tucker,* 364 U. S. 479. Further, the limitations of the Fifth Amendment's privilege against self-incrimination also need not be elaborated here. See *Garrity* v. *New Jersey,* 385 U. S. 493; *Spevak* v. *Klein,* 385 U. S. 511.

even present facts or data bearing on his fitness as a teacher.[34] What he is required to do is to make one and only one response to a question that assumes general irresponsibility—and the correct answer has been prescribed by the legislature. Failure to answer or to give the prescribed one has automatically barred the Appellant from teaching at the University of Maryland despite the fact that he would have been a valuable addition to the faculty of the University.

This Court's recent depreciation of *Adler* v. *Board of Education*, 342 U. S. 485—see generally *Keyishian* v. *Board of Regents*, 385 U. S. 589—leaves *Garner* v. *Board of Public Works*, 341 U. S. 716 as the only significant precedent in which an across-the-board loyalty oath provision seemed to be upheld. *Garner*, however, is now weak authority. First, it may be in direct conflict with the Court's decisions both in *Keyishian* v. *Board of Regents* and in *Elfbrandt* v. *Russell*, 384 U. S. 11. The statute in *Garner* denied employment to any person who within five years had been a knowing member of any organization that "advised, advocated, or taught the overthrow by force or violence" of the state or federal government. 341 U. S. at 717-718. Clearly, therefore, the statute would exclude from public employment knowing members who were not active or who

[34] The lack of any legitimate intention to gather information from particular persons dealing with their competency distinguishes this case from *Beilan* v. *Board of Education*, 357 U. S. 399. It also distinguishes this case from such cases as *Lerner* v. *Casey*, 357 U. S. 468; *Nelson* v. *Los Angeles County*, 362 U. S. 1; *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Konigsberg* v. *State Bar of California*, 366 U. S. 36; *In re Anastoplo*, 366 U. S. 82. In addition, none of these five cases involved school teachers. The first two involved other kinds of municipal employees and the last three involved admission to the Bar. The significance of this additional distinction is taken up *infra* in the text.

lacked the "specific intent" to further the organization's unlawful aims, and is not acceptable under the *Elfbrandt* and *Keyishian* decisions. See Isreal, *Demise,* 1966 SUP. CT. REV. 193, 211-213; Leahy, *Loyalty and the First Amendment—A Concept Emerges,* 43 N. D. L. Rev. 53, 74-75 (1966). Second, the *Garner* decision also relied heavily on an understanding of the prohibition against Bills of Attainder that no longer has vitality. See *United States* v. *Brown,* 381 U. S. 437, discussed *infra* under Point IV.

Third, *Garner* is further not dispositive of the present case because it was decided under the now discredited doctrine that public employment is a privilege as opposed to a right. The great growth of government activity, the multiplication of the categories of people in government employment and the ever increasing absolute and relative number of people on federal, state and local government payrolls dictate the reality that government employment cannot be treated in law as a mere privilege. Indeed, in a significant line of cases since *Garner,* the Court has recognized this fact of our social, political and economic life. And in *Keyishian* v. *Board of Regents,* 385 U. S. 589, 605, the Court unequivocally rejected the doctrine "that public employment including academic employment may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action." See also, *Elfbrandt* v. *Russell,* 384 U. S. 11; *Baggett* v. *Bullitt,* 377 U. S. 360; *Cramp* v. *Board of Public Instruction,* 368 U. S. 278; *Torcasco* v. *Watkins,* 367 U. S. 488, 495-96; *Shelton* v. *Tucker,* 364 U. S. 479; *Weiman* v. *Updegraff,* 344 U. S. 183, 192.[35] And when the principle of affording con-

[35] In these and additional cases, the Court has disclosed that unconstitutional conditions may not be interposed on the enjoyment of interests that traditionally had been classified as mere "privi-

stitutional protection to persons seeking to obtain or retain public employment is viewed in the light of the Court's increasing emphasis on the freedoms protected by the First Amendment, see, *e.g.*, *DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825; *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Gibson* v. *Florida Legislative Committee*, 372 U. S. 539, freedoms upon which across-the-board loyalty oaths or statutory provisions encroach so dangerously, it becomes apparent that the basis for *Garner* has been wholly removed.

Aside from *Garner's* lack of continued vitality, it has an important difference from the case at bar. The present case, brought by a teacher, presents issues of freedom of speech and conscience in one of the most significant and sensitive contexts, that of academic freedom. This court has long recognized the important constitutional dimension of academic freedom. See, *e.g.*, *Barenblatt* v. *United States*, 360 U. S. 109, 112; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250; *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (Frankfurter, J. concurring). See also, *e.g.*, EDUCATIONAL FREEDOM IN AN AGE OF ANXIETY (Hullfish, ed., 1953); KONVITZ, EXPANDING LIBERTIES 86-108 (1966); MACIVER, ACADEMIC FREEDOM IN OUR TIME (1955); LAZARSFELD AND THIELENS, THE ACADEMIC MIND (1958); Morris, *Academic Freedom and Loyalty Oaths*, 28 LAW AND CONTEMPORARY PROBLEMS 487 (1963); Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW AND CONTEMPORARY

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leges," evincing a general breakdown in the conceptualistic "privilege-right" dichotomy. See, *e.g.*, *Lamont* v. *Postmaster General*, 381 U. S. 301; *Schneider* v. *Rusk*, 377 U. S. 163; *Sherbert* v. *Verner*, 374 U. S. 398; *Speiser* v. *Randall*, 357 U. S. 513; see also, *e.g.*, *Lawson* v. *Housing Authority of Milwaukee*, 270 Wis. 269, 70 N. W. 2d 605 (1955), *cert. denied*, 350 U. S. 882.

PROBLEMS 447 (1963). The Court has, in fact, clearly recognized and given protection to academic liberty, which is at the core of the First Amendment. In *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603, the Court specifically held that:

> "Our Nation is deeply committed to safeguarding academic freedom, which is the transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is no where more vital than in the community of American schools.'"

Thus coming out of that Amendment is a preferred position for intellectual freedom. Unjustified encroachment on this freedom or liberty by such requirements as are provided by Article 85A cannot be tolerated and are clearly unconstitutional.

The earlier cases upholding across-the-board loyalty tests must also be viewed in the light of the development into an inescapable principle that "[w]here there is a significant encroachment upon personal liberty [particularly that protected by the First Amendment], the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U. S. 516, 524.[36] It is now clear that in these cases it is the state which must carry the

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[36] Notably, this was not the test applied by the Maryland Court of Appeals in *Shub* v. *Simpson*, 196 Md. 177, 195, 76 A. 2d 332, 340 (1950). In upholding the Ober Law, the Maryland court viewed it through "a presumption in favor of its validity".

burden of showing a substantial relationship between its regulation, prohibition or demand and a subject of overriding and compelling state interest. *E.g., Gojack* v. *United States,* 384 U. S. 702; *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825; *Gibson* v. *Florida Legislative Committee,* 372 U. S. 539; *Sweezy* v. *New Hampshire,* 354 U. S. 234; *cf. Griswold* v. *Connecticut,* 381 U. S. 479.

Although *Bates, Gojack, DeGregory, Gibson* and *Sweezy,* all dealt with legislative investigations, the principle they established, as to state's burden of showing compelling and subordinating interests to impinge First Amendment rights, is equally applicable to the realm of loyalty oaths. *Lawson* v. *Housing Authority of Milwaukee,* 270 Wis. 269, 70 N. W. 2d 605 (1955), *cert. denied,* 350 U. S. 882.

During the fifteen years that Maryland has had its Ober Law and oath, the state has prosecuted no one for subversive activities and no one has been discharged as a subversive. *Cf. Poe* v. *Ullman,* 367 U. S. 497. Several conscientious people have been denied employment or discharged because they refused to execute the test oath. See *e.g.,* Prendergast *Maryland: The Ober Anti-Communist Law,* in THE STATES AND SUBVERSION (1952, Gellhorn, ed.) at 140, 169-170; *Bently Glass on Test Oaths,* 46 AAUP BULLETIN 290-291 (Autumn, 1960). No doubt many other conscientious and qualified persons have decided not to enter the state's employ because they abhor test oaths—much to the state's loss. Weighing the ineffectiveness of the Ober Law and oath against the tragically inhibiting effect of such oaths and laws, particularly with respect to teachers, see, *e.g., Keyishian* v. *Board of Regents,* 385 U. S. 589, 607; LAZARSFELD AND THIELENS, THE ACADEMIC MIND 84-85, 92-112, 192-217, 240, *passim*

(1958), on the preferred First Amendment freedoms, and considering that the state can achieve its legitimate ends in less stultifying ways, *Shelton* v. *Tucker,* 364 U. S. 479, 488; *Keyishian* v. *Board of Regents;* 385 U. S. 589, 609, for example through the ordinary criminal processes, or perhaps through systems of specific inquiry when reasonable grounds exist for questioning loyalty, *but cf. Garrity* v. *New Jersey,* 385 U. S. 493; *Spevak* v. *Klein,* 385 U. S. 511, the conclusion is compelled that oaths such as Maryland's, and the statutes that require them, "which blankets all state employees, regardless of the 'sensitivity' of their positions," *Keyishian* v. *Board of Regents,* 385 U. S. 589, 607; *compare Bond* v. *Floyd,* 385 U. S. 116, are unconstitutional conditions on public employment.

III.

The Maryland Act and "Certification" infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law.

Under Article 85A, upon refusing to execute the required "Certification of Applicant for Public Employment," the Appellant (and all others similarly situated) was automatically rendered ineligible for public employment. The statute makes no provision for a hearing at which the Appellant would be afforded an opportunity to explain or defend his reason for refusing to execute the oath or to get

a clarification of the requirement. See *Heckler* v. *Shephard*, 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge); *cf. Keyishian* v. *Board of Regents*, 385 U. S. 589, 608-609 (by implication); *In re Gault*, 87 S. Ct. 1428. Numerous circumstances can be conceived, moreover, which would cause a person to refuse to execute the oath, required under this statute, and which would in no way reflect on the person's loyalty or fitness for the job. For example, a person might be associated with a "subversive organization" or "in one way or another engaged in the attempt to overthrow the Government" for purposes of counter-espionage or for scholarly or other field study. *Compare, e.g., Aptheker* v. *Secretary of State*, 378 U. S. 500, 511-12; *Baggett* v. *Bullitt*, 377 U. S. 360, 367-70; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 600-601. In addition, as is the case at hand, a person might refuse to execute this oath on conscientious grounds or because he finds it offensive or insulting. See, *e.g., Torcaso* v. *Watkins*, 367 U. S. 488; *Sherbert* v. *Verner*, 374 U. S. 398; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *cf., e.g., DeGregory* v. *Attorney General of New Hampshire*, 383 U. S. 825.

In *Slochower* v. *Board of Education of New York*, 350 U. S. 551, 559, the Court said:

> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law."

Accord, Heckler v. *Shepard,* 243 F. Supp. 841, 845-846 (E. D. Idaho, 1965) (Three Judge Court); see also, *Keyishian* v. *Board of Regents,* 385 U. S. 589, 608-609; *Nelson* v. *Los Angeles County,* 362 U. S. 1, 8 n. 5; *Nostrand* v. *Little,* 362 U. S. 474, 475, *on remand,* 58 Wash. 2d 111, 361 P. 2d 551, 566-567 (1961), *appeal dismissed, per curiam,* 368 U. S. 436; *Baggett* v. *Bullitt,* 377 U. S. 360, 384 (Clark and Harlan, *JJ.,* dissenting); *Whitehill* v. *Elkins,* 258 F. Supp. 589, 597-98 n. 1 (1967) (Sobeloff, *J.,* concurring); *cf. Konigsberg* v. *State Bar of California,* 366 U. S. 36; *In re Anastaplo,* 366 U. S. 82. And in recent cases concerning control of obscenity, the Court has further stressed the importance of hearings when First Amendment rights may be jeopardized by government action. See, *e.g., A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Bantam Books* v. *Sullivan,* 372 U. S. 58; *Marcus* v. *Search Warrant,* 367 U. S. 717. *Cf. Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144.

Maryland's loyalty oath and the statutory provisions pursuant to which it is required as a condition to public employment may, although it is unlikely, exclude some disloyal or otherwise unfit employees, but it certainly excludes loyal and fit persons who are highly conscientious and sensitive, without according them any opportunity to explain their refusals to execute the oath. Such indiscriminate classification of the innocent with knowing activity offends due process of law. *E.g., Wieman* v. *Updegraff,* 344 U. S. 183; *Elfbrandt* v. *Russell,* 384 U. S. 11. A meaningful opportunity must be afforded an employee, or a potential employee,[37] *cf. Torcaso* v. *Watkins,* 367 U. S. 488;

[37] In *Keyishian* v. *Board of Regents,* 385 U. S. 589, 592, the Court noted that "Keyishian's one-year-term contract was not renewed because of his failure to sign the certificate." Nevertheless his appeal was heard and decided.

Bond v. *Floyd*, 385 U. S. 116; *Murphy, Academic Freedom—An Emerging Constitutional Right*, 28 LAW AND CONTEMPORARY PROBLEMS 447, 481-484 (1963) at least to prove his fitness despite his refusal to take the oath. See, *e.g.*, *Slochower* v. *Board of Education of New York*, 350 U. S. 551; *Heckler* v. *Shepard*, 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge Court). No such opportunity is provided the applicant for employment under Maryland's Subversive Activities Law of 1949. See Article 85A, Sections 11 and 13.

In *Speiser* v. *Randall*, 357 U. S. 513, this Court struck down a California oath which was required before property owners could qualify for a tax exemption. The Court held that since the oath infringed upon freedom of expression, and, since it did so by using a procedure that placed "the burdens of proof and persuasion on the taxpayer [it was] . . . a violation of due process of law." 357 U. S. at 529. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure," *ibid.*, namely, to execute the oath as a condition of obtaining a tax exemption.

Speiser applies to this case in at least two ways. On the one hand, the Appellant here has been required, as the appellants were in *Speiser*, to take the first step, execution of the oath, in an invalid series of steps which are procedurally defective, namely, they deprive the Appellant of due process because, as pointed out above, the Maryland Subversive Activities Law does not offer any hearing to an applicant who declines to execute the oath or who desires a clarification of its meaning. There can be no doubt of the burden of free expression in this case. Sec-

ondly, as in *Speiser*, there is a shifting of the burdens of persuasion and proof, under the threat of perjury prosecution and loss or refusal of employment, which achieve the same constitutionally forbidden result: the deterrence of free expression which was disallowed in *Speiser*. In that case, the Court stated:

> "The vice of the present procedure is that, when particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis* v. *United States, supra,* provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." 357 U. S. at 526.

The philosophy of the *Speiser* decision was followed by the Court in *Freedman* v. *Maryland,* 380 U. S. 51, where it was held that the burden of going forward with the evidence and of persuasion that a motion picture is censorable must be placed on the censor. *Cf.* also, *Smith* v. *Cali-*

fornia, 361 U. S. 147. The same basic problem was also handled by this Court in *Lamont* v. *Postmaster General,* 381 U. S. 301, 307, where the Court held that the requirement that " . . . the addressee in order to get his [allegedly foreign political propaganda] mail must request in writing that it be delivered . . . amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment rights."

The provision and oath in this case are particularly insidious in that the oath-taker is put to the odious and impossible task of declaring, and if necessary, proving a negative, *i.e.,* that he is *not,* in effect, disloyal. See *Bently Glass on Test Oaths,* 46 AAUP BULLETIN 290-291 (Autumn, 1960) (Letter of a distinguished Johns Hopkins University Scientist explaining to Maryland's Governor why he would not execute the Ober oath as a condition to his appointment to a state advisory commission).[38] Such oaths and

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[38] Historically, oaths of this character have been peculiarly distasteful to Marylanders, as events attending the War Between the States demonstrate. On September 17, 1861 a large number of Maryland officials, including nineteen members of the State Legislature were arrested "on suspicion of disloyalty" and dispatched to a number of Federal prisons. By and large no charges were placed against these men and no very specific reasons were given for this extreme action. An apparently unexpected public furor over these arrests promptly made the whole episode politically embarrassing to the administration. A test oath being used for a variety of purposes at the time appeared to be a solution: Anyone willing to take the oath was to be released. The great majority of imprisoned Maryland officials refused in spite of the damage to health and fortune and the loss of reputation they were suffering. Their position was firm: They had done nothing to justify their treatment; there was no reason in justice or principle why they should be singled out for any special burden or required, by swearing or otherwise, to demonstrate their loyalty by means not required of other citizens.

"And here was the heart of the matter, for what most of the nonjurors were objecting to in the oath requirement was that

inquiries are relics of the Salem Witch Trials, see, *e.g.*, STARKEY, THE DEVIL IN MASSACHUSETTS (1950), and earlier abominations. Unlike simple and affirmative declarations to support the Constitution that may be required of elected and high appointed officials and possibly of others in especially sensitive positions, see *Bond* v. *Floyd*, 385 U. S. 116; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 607 (by implication), they have no textual basis in the federal Constitution. *Compare* U. S. Const., Art. II, §1, ¶8; Art. VI, ¶3.

Maryland's loyalty oath, and the statute under which it is required, as all such negative disclaimer oaths and statutes, by their very nature place the burdens of persuasion and proof onto Appellant, and others similarly situated, necessarily resulting in an undue deterrence of speech which the Constitution makes free and also a subversion

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in taking it the prisoner assumed in the public eye an admission of guilt. After months in jail, still ignorant of precisely why they had been sent there in the first place, despite filth and poor food, rheumatism and distraught families, most of the Maryland men were ready to stay in prison rather than imply by taking the oath that their incarceration had been just." HYMAN, TO TRY MEN'S SOULS 150-51.

The principle was simply and poignantly expressed by Thomas John Claggett, a member of the Legislature, in a letter to his brother-in-law. Claggett was an uncomplicated man, a farmer whose only offense had been election to the State Legislature at a difficult time.

"Until recently, I knew that no one could be released from here however good his case or influential his friends without taking an oath. I had already taken an oath to support the Constitution and laws of the United States which I had not violated or intended to violate. I did not wish to give countenance to the imputation that I had done so either by taking an oath (which other citizens of Maryland were not required to take) or in any other way." *Thomas John Claggett*, MARYLAND HISTORICAL MAGAZINE XLVII (June, 1952) 133.

of the Fifth Amendment's privilege against self-incrimination. The Maryland scheme presumes the guilt, and non-employability of all persons, presuming either that they advocate the prohibited doctrines or that they are mere knowing members of the prohibited organizations or that they are active and violent revolutionaries. If and only if an affiant comes forward and executes the expurgatory oath may he become a member of the favored group, the group eligible for state employment. The oath is exacted from all alike—the loyal and disloyal. In other words, the oath presumes non-employability and then shifts onto applicants the task of understanding the complex statutory definitions of subversion and then, without opportunity for hearing, requires applicants to make their declarations which may subject them to criminal sanction. This act and oath therefore, are "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment," *Lamont* v. *Postmaster General,* 381 U. S. 301, 307; see also, *Keyishian* v. *Board of Regents,* 385 U. S. 589, and also the Fifth Amendment, see *Garrity* v. *New Jersey,* 385 U. S. 493; *Spevak* v. *Klein,* 385 U. S. 511. And, as the Court recently said in *Elfbrandt* v. *Russell,* 384 U. S. 11, 17-18: "The unconstitutionality of this Act follows *a fortiori* from *Speiser* v. *Randall,* 357 U. S. 513, where we held that a State may not even place on an applicant for a tax exemption the burden of proving that he is not engaged in criminal advocacy."

IV.

The required "Certification" and the statute pursuant to which it is given constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution.

The provisions of Article 85A and oath given pursuant to it constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution. The oath in question is a test oath, punishing Appellant and others similarly situated, legislatively without any adjudicatory process. The oath functions to deprive otherwise fully qualified and competent employees and applicants for employment of their employment, good consciences, professional integrity and political rights.

In *Cummings* v. *Missouri*, 71 U. S. (4 Wall.) 277, 320, the Court held: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment . . ." and that statutory or state constitutional provisions having that effect constituted Bills of Attainder. At issue, and struck down, in the particular case were state constitutional provisions that required the taking of a test oath as a condition of, among other things, holding public office or employment or voting. See also *Ex parte Garland*, 71 U. S. (4 Wall.) 333. In *United States* v. *Lovett*, 328 U. S. 303, denial of compensation for federal employment was also held a sufficient deprivation to invalidate a statute as a Bill of Attainder.

It is true that the Court has more recently several times rejected the attainder argument in loyalty oath cases. *E.g.*,

Garner v. *Board of Public Works*, 341 U. S. 716, 722-23. But recently there has been considerable change in the law relating to Bills of Attainder. In *United States* v. *Brown*, 381 U. S. 437, the Court struck down the provisions of the federal Landrum-Griffin Act which made it criminal for Communists to hold leadership positions in labor unions. Whatever may have been the purpose of the disqualification, and despite the absence of any disqualification of named persons, the Court found the whole scheme violative of the attainder clause of the Constitution. The relevance of that case to the present one is significant. After a careful review of the ingredients of the Bill of Attainder decisions, one commentator recently concluded that disclaimer-type loyalty oaths, viewed in the contexts of their authorizing statutes, raise serious attainder problems:

> "Such oaths contain the three elements necessary for a finding of a bill of attainder. The individuals subject to the sanctions of such oaths are identified with the required specificity, since it is only members of politically unpopular organizations who suffer the deprivations prescribed under the oath. The sanction imposed—disqualification from a particular job—is punishment appropriate in a bill of attainder context. And the sanction is imposed automatically, without judicial intervention. The person who cannot truthfully subscribe to the oath is denied employment." Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 Calif. L. Rev. 212, 250-251 (1966).

Thus the fact that criminal punishment does not follow is no longer dispositive of the attainder question; a loyalty

test which carries the sanction of loss or denial of employment may be just as much a Bill of Attainder as one which imposes the sanction of imprisonment or loss of life. Although this Court has not yet invalidated a loyalty oath on attainder grounds, there has been no warrant for this Court to reach the question in any of its recent cases. But any oath which passes muster against other constitutional attacks, must today withstand additional scrutiny on attainder grounds. The Ober oath and its authorizing statute cannot, as we have already argued, survive the other constitutional arguments raised. But even if it could, that oath nevertheless represents an unconstitutional Bill of Attainder.

CONCLUSION

The Appellant has attempted in the foregoing brief to examine in detail the numerous constitutional infirmities inherent in the Maryland Subversive Activities Act. For eighteen years this act has been an affront to loyal, conscientious people seeking public employment in the State of Maryland. For eighteen years it has had an inhibiting effect on the State's educational system. For eighteen years it has infringed upon rights guaranteed by the Fourteenth Amendment of the United States Constitution. The time has finally come for its demise.

Since its enactment the Act and the oath required pursuant to it have stood on such shaky underpinnings as the *Gerende* decision, a brief *per curiam;* the *Adler* decision and the privilege-right dichotomy, both recently discredited as a basis for constitutional doctrine. The decisions of this Court have consistently eaten away at these underpinnings.

The attempts by the Attorney General of Maryland to modify the legislative enactment administratively can in no way insulate the enactment from judicial attack. The Act continues to stand and the oaths continue to be administered under the authority provided in the Act and nowhere else. The Act, all of its provisions interconnected through its definitional section, and the oath required under it are broad; they are vague; they are indefinite. Together they infringe on academic freedom and freedom of speech, association, conscience and belief. Together they deny procedural due process of law. Together they constitute a Bill of Attainder. Together they violate the relevant provisions of the Constitution as interpreted by this Court. The Appellant therefore respectfully requests that this Court declare the Maryland Subversive Activities Law, Art. 85A, Md. Code Annot. (1957), particularly its definitional and loyalty provisions, and the "Certification of Applicant for Public Employment" unconstitutional; and that the case be remanded to the District Court with instructions to enter an appropriate order enjoining the Appellees from enforc-

ing the statute and the "Certification," and granting other necessary relief, including back wages, see, *e.g., Bond* v. *Floyd,* 385 U. S. 116, 128 n. 4; *Bomar* v. *Keyes,* 162 F. 2d 136 (2d Cir. 1947), *cert. denied,* 332 U. S. 825, to the Appellant.

Respectfully submitted,

SANFORD JAY ROSEN
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

ELSBETH LEVY BOTHE
41 West Preston Street
Baltimore, Maryland 21201

JOSEPH S. KAUFMAN
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202

Attorneys for Appellant

LEE M. MILLER
1100 One Charles Center
Baltimore, Maryland 21202

*Of Counsel**

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APPENDIX

United States Constitutional Provisions Involved

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Maryland Subversive Activities Act of 1949

Article 85A

ANNOTATED CODE OF MARYLAND (1957)
SEDITION AND SUBVERSIVE ACTIVITIES

§ 1. *Definitions.*

For the purposes of this article:

"Organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence.

"Foreign subversive organization" means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of, the United States, or of the

State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means.

"Foreign government" means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization. (An. Code, 1951, § 1; 1949, ch. 86, § 1.)

SEDITION

§ 2. *Unlawful acts.*

It shall be a felony for any person knowingly and wilfully to:

(a) Commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or

(b) Advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the United States, or of the State of Maryland or of any political subdivision of either of them; or

(c) Conspire with one or more persons to commit any such act; or

(d) Assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization; or

(e) Destroy any books, records or files, or secrete any funds in this State of a subversive organization or a foreign subversive organization, knowing said organization to be such.

Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of this section shall be fined not more than twenty thousand dollars, ($20,000), or imprisoned for not more than twenty (20) years, or both, at the discretion of the court. (An. Code, 1951, § 2; 1949, ch. 86, § 2.)

§ 3. *Membership in subversive organization.*

It shall be a felony for any person after June 1, 1949 to become, or after September 1, 1949 to remain a member of a subversive organization or a foreign subversive organization knowing said organization to be a subversive organization or foreign subversive organization. Any person who shall be convicted by a court of competent jurisdiction of violating this section shall be fined not more than five thousand dollars ($5,000), or imprisoned for not more than five (5) years, or both, at the discretion of the court. (An. Code, 1951, § 3; 1949, ch. 86, § 3.)

§ 4. *Effect of conviction.*

Any person who shall be convicted by a court of competent jurisdiction of violating any of the provisions of §§ 2 and 3 of this article, in addition to all other penalties therein provided, shall from the date of such conviction be barred from:

(a) Holding any office, elective or appointive, or any other position of profit or trust in or employment by the government of the State of Maryland or of any agency thereof or of any county, municipal corporation or other political subdivision of said State;

(b) Filing or standing for election to any public office in the State of Maryland; or

(c) Voting in any election held in this State. (An. Code, 1951, § 4; 1949, ch. 86, § 4.)

§ 5. *Dissolution of organizations.*

It shall be unlawful for any subversive organization or foreign subversive organization to exist or function in the State of Maryland and any organization which by a court of competent jurisdiction is found to have violated the provisions of this section shall be dissolved, and if it be a corporation organized and existing under the laws of the State of Maryland a finding by a court of competent jurisdiction that it has violated the provisions of this section shall constitute legal cause for forfeiture of its charter and its charter shall be forfeited under the provisions of Article 23, §§ 104-108, inclusive, Annotated Code of Maryland [1939 Code] and all funds, books, records and files of every kind and all other property of any organization found to have violated the provisions of this section shall be seized by and for the State of Maryland, the funds to be deposited in the State treasury and the books, records, files and other property to be turned over to the Attorney General of Maryland. (An. Code, 1951, § 5; 1949, ch. 86, § 5.)

§ 6. *Special assistant attorney general—Appointment, salary and supervision.*

The Attorney General of Maryland is hereby authorized and directed to appoint an additional assistant to perform the duties of special assistant attorney general in charge of subversive activities whose annual salary shall be provided in the budget, and whose responsibility it shall be, under supervision of the Attorney General, to assemble, arrange and deliver to the State's attorney of any county or of Baltimore City, together with a list of necessary

witnesses, for presentation to the next grand jury to meet in said county or city, all information and evidence of matters within said county or Baltimore City which have come to his attention, relating in any manner to the acts prohibited by this article, and relating generally to the purposes, processes and activities of communism and any other or related subversive organizations, associations, groups or persons. (An. Code, 1951, § 6; 1949, ch. 86, § 6.)

§ 7. *Same—Assistance in collection of evidence and information.*

For the collection of any evidence and information referred to in this article, the Attorney General is hereby directed to call upon the Superintendent of State Police, the police commissioner of Baltimore City and other county and municipal police authorities of the State to furnish to the special assistant hereinbefore provided for, such assistance as may from time to time be required. Such police authorities are directed to furnish information and assistance as may be from time to time so requested. The special assistant attorney general herein provided for may testify before any grand jury as to matters referred to in this article as to which he may have information. (An. Code, 1951, § 7; 1949, ch. 86, § 7.)

§ 8. *Same—Records and reports.*

The Attorney General shall require the special assistant herein provided for, to maintain complete records of all information received by him and all matters handled by him under the requirements of this article. Such records as may reflect on the loyalty of any resident of this State,

shall not be made public or divulged to any person except with permission of the Attorney General to effectuate the purposes of this article. He shall further require the publication, printing and appropriate distribution of all reports of grand juries of this State made as hereinafter provided. The Attorney General shall include in his budget estimates, adequate moneys for the printing and distribution of the said reports, and for all other expenses of administering this article. To the extent that his time may not be required in his duties under this article, the special assistant attorney general shall be available for and perform such other duties as may be assigned to him by the Attorney General. (An. Code, 1951, § 8; 1949, ch. 86, § 8.)

§ 9. *Duty of judges as to grand jury.*

The judge of the criminal court of each county and of Baltimore City, when in his discretion it appears appropriate, or when informed by the State's attorney that there is information or evidence of the character described in § 6 of this article to be considered by the grand jury, shall charge the grand jury to inquire into violations of this article for the purpose of proper action, and further to inquire generally into the purposes, processes and activities and any other matters affecting communism or any related or other subversive organizations, associations, groups or persons. Any grand jury charged by the court as provided herein shall not later than the conclusion of its term of service prepare a written report, separate from all other matters considered by said grand jury, of its findings upon the subjects placed before it under the requirements of this article, provided, however, such report shall not

charge any residents of this State with being disloyal unless they shall have been indicted under the provisions of this article or other provisions of the criminal law of this or some other jurisdiction. (An. Code, 1951, § 9; 1949, ch. 86, § 9.)

LOYALTY

§ 10. *Subversive person not eligible for governmental office.*

No subversive person, as defined in this article, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this State, or of any county, municipality, or other political subdivision of this State. (An. Code, 1951, § 10; 1949, ch. 86, § 10.)

§ 11. *Rules and regulations to determine loyalty—In general.*

Every person and every board, commission, council, department, court or other agency of the State of Maryland or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain before any person, including teachers and other employees of any public educational institution in this State, is appointed or employed, that he or she as the case may be, is not a subversive person, and that there are no reasonable grounds to believe such persons are subversive persons. In the event such reasonable grounds exist, he or she as the case may be shall not be appointed or em-

ployed. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. (An. Code, 1951; § 11; 1949, ch. 86, § 11.)

§ 12. *Same—Not applicable to laborers.*

The inquiries prescribed in § 11, other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in the classification of laborers in any case in which the employing authority shall in his or its discretion determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of persons as to whom there may be reasonable grounds to believe that they are subversive persons as defined in this article will not be dangerous to the health of the citizens or the security of the governments of the United States, the State of Maryland, or any political subdivision thereof. (An. Code, 1951, § 12; 1949, ch. 86, § 12.)

§ 13. *Statement of employees.*

Every person, who on June 1, 1949 shall be in the employ of the State of Maryland or of any political subdivision thereof, other than those now holding elective office shall be required on or before August 1, 1949, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article, namely, any person who

commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this article. Such statement shall be prepared and execution required by the State Commissioner of Personnel for all persons whose employment is subject to the provisions of Article 64A of the Annotated Code of Maryland and by the city service commission of Baltimore for all employees whose employment is subject to the provisions of §§ 142 to 156 of the Baltimore City Charter and by every person and every board, commission, council, department, court or other agency of the State of Maryland or any political subdivision thereof responsible for the supervision of other employees, for employees under its jurisdiction. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this article shall immediately be discharged. (An. Code, 1951, § 13; 1949, ch. 86, § 13; 1953, ch. 310.)

§ 14. *Discharge from office.*

Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this article, shall be cause for discharge from any appointive office or other position of profit or trust in the government of or

in the administration of the business of this State, or of any county, municipality or other political subdivision of this State, or any agency thereof. The State Commissioner of Personnel and the civil service commission of Baltimore shall, by appropriate rules or regulations, prescribe that persons charged with being subversive persons, as defined in this article, shall be accorded notice and opportunity to be heard, in accordance with the procedures prescribed by law for discharges for other reasons. Every person and every board, commission, council, department, or other agency of the State of Maryland or any political subdivision thereof having responsibility for the appointment, employment or supervision of public employees not covered by the classified service in this section referred to, shall establish rules or procedures similar to those required herein for classified services for a hearing for any person charged with being a subversive person, as defined in this article, after notice and opportunity to be heard. Every employing authority discharging any person pursuant to any provision of this article shall promptly report to the special assistant attorney general in charge of subversive activities the fact of and the circumstances surrounding such discharge. A person discharged under the provisions of this section shall have the right to appeal to the circuit court of the county or to the Baltimore City court wherein such person may reside for a determination by such court (with the aid of a jury, if the appellant so elects) as to whether or not the discharge appealed from was justified under the provisions of this article. The court shall speedily hear and determine such appeals, and from the judgment of the court, there shall be a further appeal to the

Court of Appeals of Maryland as in civil cases. (An. Code, 1951, § 14; 1949, ch. 86, § 14; 1953, ch. 310; 1962, ch. 36, § 54.)

§ 15. *Statements of candidates for office.*

No person shall become a candidate for election under the provisions of Article 33 of the Annotated Code of Maryland to any public office whatsoever in this State, unless he or she shall file with the certificate of nomination required by the foregoing Article 33, an affidavit that he or she is not a subversive person as defined in this article; provided that, in the case of certificates of nomination for President or Vice-President of the United States, the affidavit may be made on behalf of such candidates by those persons who file the certificate of nomination for such candidates. No certificate of nomination shall be received for filing by any board of supervisors of elections or by the Secretary of State of Maryland unless accompanied by the affidavit aforesaid, and there shall not be entered upon any ballot or voting machine at any election the name of any person who has failed or refused to make the affidavit aforesaid. (An. Code, 1951, § 15; 1949, ch. 86, § 15.)

§ 16. *Statement of private institution of learning before receiving public funds.*

Before any appropriation of public funds of any character shall be made by the State of Maryland to any private institution of learning, there shall be filed with the Governor, the President of the Senate and the Speaker of the House of Delegates, on behalf of said institution, a written report setting forth what procedures it has adopted to de-

termine whether it has reasonable grounds to believe that any subversive persons are in its employ, and what steps, if any, have been or are being taken to terminate such employment. In the absence of such a report no appropriation shall be included in the State budget or approved by the General Assembly. (An. Code, 1951, § 16; 1949, ch. 86, § 16.)

§ 17. *False statements constitute perjury.*

Every written statement made pursuant to this article by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this article, or (c) under oath in any hearing conducted by any agency of the State, or of any of its political subdivisions, pursuant to this article, or (d) in any written statement by an applicant for appointment or employment or by an employee in any State aid or private institution of learning in this State, intended to determine whether or not such applicant or employee is a subversive person as defined in this article, which statement contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury prescribed in Article 27, § 439 of the Annotated Code. (An. Code, 1951, § 17; 1949, ch. 86, § 17.)

§ 18. *Severability.*

If any provision, phrase, or clause of this article or the application thereof to any person or circumstance is held

invalid, such invalidity shall not affect other provisions, phrases, or clauses or applications of this article which can be given effect without the invalid provision, phrase, or clause or application, and to this end the provisions, phrases and clauses of this article are declared to be severable. (An. Code, 1951, § 18; 1949, ch. 86, § 18.)

§ 19. *Short title.*

This article may be cited as the Subversive Activities Act of 1949. (An. Code, 1951, § 19; 1949, ch. 86, § 19.)

CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT

Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)

"I, ..., do hereby
(Print Name—including middle initial)
certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

"I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

Date .....

Signature .....
(Name—including middle initial)

Letter from Attorney General Finan to Governor Tawes

State of Maryland
State Law Department
One Charles Center
Baltimore, Md. 21201

May 13, 1966

The Honorable J. Millard Tawes
Governor of the State of Maryland
State House
Annapolis, Maryland 21404

Dear Governor:

As you may know, on April 18, 1966, the Supreme Court of the United States, dividing 5-4, in *Elfbrandt* v. *Russell,* 34 L.W. 4347, struck down as unconstitutional the Arizona loyalty oath required of public employees of that State and its political subdivisions. The Arizona statute subjected to prosecution for perjury and discharge from public office anyone who took the oath and who "knowingly and willfully becomes or remains" a member of the Communist Party, or "any other organization" having for "one of its purposes" the violent overthrow of the State government, or any of its political subdivisions, where the employee had knowledge of the unlawful purpose.

The Supreme Court declared that:

> "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."

Letter from Attorney General Finan to Governor Tawes

In light of the *Elfbrandt* decision, the Maryland Loyalty Pledge has been modified, by eliminating the words "and I am not knowingly a member of an organization engaged in such an attempt", to read as follows:

> "I, ... do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

This office is advising the Secretary of State and the Commissioner of Personnel of the modified loyalty pledge devised by this office to meet the constitutional standards required by the decision in the Arizona case.

We are also advising the legal officers of all of Maryland's political subdivisions of the modification, with the suggestion that they recommend to their governing bodies that the County oath, where different, be made to conform to the State oath.

With kind personal regards, I remain

Sincerely,

THOMAS B. FINAN,
Attorney General.

Compilation of State Loyalty Standards for Teachers*

Key

"School" means elementary or secondary school.

"College" means college or university.

"Oath" means that the standard is carried out by requiring oaths of the designated classes of individuals.

Note: Many states may have oaths and disclaimer affidavits for public employees which are probably applied to teachers in public educational institutions. Some of these may be inadvertently admitted in Part I.

I. All public employees:

Ala. Code, tit. 14, § 97(7) (1958) (no oath).

Alaska Const. art. XII, §§ 4, 5 (oath).

Ariz. Rev. Stat. § 15-231 (1956), § 38-231 (1965 Supp.). Held unconstitutional in *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966) (oath).

Fla. Stat. Ann. § 876.05-.09 (1965). Held unconstitutional in *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278 (1961) (oath).

Ga. Code Ann. § 89-311 to -316 (1963). Held unconstitutional in *Georgia Conference of American Association of University Professors* v. *Board of Regents of the University System of Georgia*, 246 F. Supp. 553 (N.D. Ga. 1965) (oath).

Hawaii, § 5-95, -108 (oath).

Idaho Code, § 59-401 (1965 Supp.). Held unconstitutional in *Heckler* v. *Shepard*, 243 F. Supp. 841 (D. Idaho, 1965) (oath).

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* This Appendix originally appeared in the Brief submitted by the Plaintiff in the case of *Pedlosky* v. *MIT*, —— Mass. ——, 224 N. E. 2d 414 (1967), to the Supreme Judicial Court of Massachusetts. It has been revised to reflect more recent developments.

Compilation of State Loyalty Standards for Teachers

Ill. Ann. Stat. c. 127, §§ 166a, 166b (1965 Supp.) (oath).
Kansas Stat. Ann. 21-305 (1964) (oath).
Neb. Rev. Stat. 11-101.01 (1962) (oath), held unconstitutional in, *Spangler* v. *Board of Regents*, Docket No. 241, D.Ct. Lancaster County, April 17, 1967, opinion reprinted *infra*, pp. 24a-27a.
New Mex. Stat. Ann. § 5-1-12 (1966) (no oath).
Ohio Rev. Code Ann. § 143.272 (1965 Supp.) (no oath).

II. PUBLIC SCHOOL TEACHERS:

Cal. Educ. Code, §§ 12952, 13121 (1960) (oath).
Del. Code Ann. §§ 1204, 1411 (1964 Supp.) (no oath).
Ind. Rev. Stat. § 28-5112 (1948) (oath).
Mont. Rev. Code Ann. § 75-4706 (1962) (oath).
Neb. Rev. Stat. §§ 79-4, 148 (1958) (oath).
Nev. Rev. Stat. §§ 391.080-310 (1965) (oath).
Okla. Stat. Ann. tit. 70 § 6-2 (1950) (no oath).
S. Car. Code § 21-372 (1962) (no oath).
W. Va. Code Ann. § 1807 (1961) (oath).

III. TEACHERS IN PUBLIC SCHOOLS AND PUBLIC COLLEGES:

Ga. Code Ann. § 32-1022 (1952) (oath).
Nev. Const. art 11, § 5 (oath).
N.Y. McK. Educ. Law § 3022 (1953) (no oath).

IV. TEACHERS IN PUBLIC SCHOOLS AND IN PRIVATE SCHOOLS RECEIVING STATE ASSISTANCE:

Tenn. Code Ann. § 49-1304 (1966) (oath).

Compilation of State Loyalty Standards for Teachers

V. TEACHERS IN PUBLIC SCHOOLS AND PUBLIC COLLEGES, AND IN PRIVATE SCHOOLS ACCEPTED BY STATE FOR PURPOSES OF COMPULSORY EDUCATION (HEREINAFTER "ACCEPTED"):

N.H. Rev. Stat. Ann. § 191:2 (1964) (oath). Held unconstitutional in *Opinion of the Justices*, —— N.H. ——, 228 A. 2d 165 (1967).

VI. TEACHERS IN PUBLIC SCHOOLS AND COLLEGES, AND IN PRIVATE SCHOOLS AND COLLEGES RECEIVING STATE FINANCIAL ASSISTANCE:

Ind. Rev. Stat. § 28-5113 (1948) (oath).
Md. Ann. Code, art. 85A, §§ 10-16 (1964) (oath).
Mich. Stat. Ann. § 15.701 (1958) (oath).
Miss. Code Ann. tit. 17, c. 10, §§ 4064-02, -05, -08 (1957) (oath).
Mont. Rev. Code Ann. §§ 18-13-9.1, -9.2 (1940) (oath).
N. Car. Cent. Code Ann. § 15-37-01, -02 (1960) (oath).
Texas Civ. Stat. §§ 2908a, b (1965) (oath).

VII. SAME AS VI EXCEPT ALSO INCLUDES TEACHERS IN ACCEPTED PRIVATE SCHOOLS:

Vt. Stat. Ann. tit. 16, § 4 (1958).

VIII. TEACHERS IN ALL PUBLIC SCHOOLS AND COLLEGES AND IN ALL PRIVATE SCHOOLS AND COLLEGES (1) RECEIVING STATE FINANCIAL ASSISTANCE OR (2) BENEFITING FROM A STATE TAX EXEMPTION:

N.Y. McK. Educ. Law § 3002 (1953) (oath). Upheld in *Knight* v. *Board of Regents*, —— F. Supp. ——, 35 U.S.L.W. 2774 (S.D.N.Y. June 2, 1967).

Compilation of State Loyalty Standards for Teachers

Wash. Rev. Code Ann. § 28.70, -.130, -.151 (1964), apparently held unconstitutional in *Baggett* v. *Bullitt*, 377 U.S. 360 (1964).

IX. TEACHERS IN ALL SCHOOLS AND COLLEGES, PUBLIC AND PRIVATE:

Colo. Rev. Stat. §§ 123-17-6, -7 (1963) (oath). Held unconstitutional in *Gallagher* v. *Smiley*, —— F. Supp. —— (D. Col. April 24, 1967), reprinted, *infra*, pp. 27a-30a.

Ore. Rev. Stat. §§ 342.619, -.620 (1965) (oath). Held unconstitutional in *Brush* v. *Board of Higher Education*, —— Ore. ——, 422 P. 2d 268 (1966).

Penalties for Violation of Future Oath.

I. CRIMINAL PENALTIES:

Ariz. oath, Ariz. Rev. Stat. § 38-231 E (1965 Supp.). The oath was held unconstitutional in *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966) (oath).

Ga. Code Ann. § 89-313, 316 (1963). The oath was held unconstitutional in *Georgia Conference of American Association of University Professors* v. *Board of Regents of the University System of Georgia*, 246 F. Supp. 553 (N.D. Ga., 1965).

II. EXPLICIT STATEMENT THAT "PENALTY" FOR "VIOLATION" IS DISMISSAL:

N.H. Rev. Stat. Ann. § 191:3 (1964). Held unconstitutional in *Opinion of the Justices*, —— N.H. ——, 228 N.E. 2d 165 (1967).

Compilation of State Loyalty Standards for Teachers

III. EXPLICIT STATEMENT THAT PROMISSORY OATH IS NOT SUBJECT TO PERJURY:

Mont. Rev. Code, § 94-3803 (1949). But see § 75-4709 (1962).

N.D. Centen. Code Ann. § 12-14-03 (1960).

"Instruction in Virtue" Statutes Applicable to Private Educational Institutions.

Ind. Stat. Ann. § 28-3428 (1948)—public and private *schools.*

Mass. Gen. Laws, c. 71, § 30A (1965)—private colleges—invalidated in *Pedlosky* v. *MIT*, —— Mass. ——, 224 N.E. 2d 414 (1967).

Rhode Island Gen. Laws, § 16-12-3 (1957)—public and private schools and colleges.

There are, however, a variety of other state statutes which govern the content of instruction in private educational institutions. Many simply detail the courses which must be taught, *e.g.*, the Constitution in eighth grade. Others say that certain attitudes must be fostered, *e.g.*, patriotism.

See also, *Internal Security and Subversion: Principal State Laws and Cases, A Study Prepared by the American Law Division Legislative Reference Service Library of Congress, for the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate,* 89th Cong., 1st Sess. (1965).

Spangler v. *Board of Regents*

IN THE

DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

Docket 241 Page 199

KILLEEN P. SPANGLER,

Plaintiff,

—v.—

THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, a body politic and corporate, etc.,

Defendant.

JOURNAL ENTRY

This matter came on for trial to the Court, jury waived, on November 16, 1966 on the Amended Petition of plaintiff, the Separate Answer of defendant The Board of Regents of The University of Nebraska, and the Reply of the plaintiff. Plaintiff was present in person and with her counsel; defendant was present through its counsel. Plaintiff adduced evidence and rested. Defendant adduced evidence and rested. Upon the conclusion of the evidence the cause was submitted on briefs and thereafter, and on March 27 1967, oral argument was held and the matter was taken under advisement by the Court. The Court, now being fully advised, finds generally in favor of the plaintiff and against the defendant, and finds that the material allegations in the Amended Petition are true; finds, adjudges and declares that the so-called "loyalty oath" requirement of

Section 11-101.01 and following of the Nebraska statutes, R.R.S. 1943 (Reissue 1962), in the light of recent United States Supreme Court decisions is unconstitutional and void; that said statute and the oath required thereby (or similar affirmation) are void for the reason that they are unconstitutionally vague and indefinite and fail to furnish a precise statement of the conduct which might be construed to violate the oath, in violation of Article I, Sections 3, 11 and 12, Constitution of the State of Nebraska, and Amendments V and XIV of the Constitution of the United States; and for the further reason that they violate freedoms of speech, expression and association, in violation of Article I, Section 3, Article I, Section 5, and Article I, Section 19 of the Constitution of the State of Nebraska, and Amendments I and XIV of the Constitution of the United States.

The Court further finds and determines that plaintiff was hired by the month at the rate of $255 per month and was discharged before completion of her monthly term of employment; that said discharge was solely by reason of her refusal to sign the oath (or similar affirmation) herein held invalid and was therefore without just or lawful cause, and plaintiff is entitled to recover from defendant the sum of $65.11 which is the unpaid balance of her monthly salary.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the "loyalty oath" requirement (or similar affirmation) of Section 11-101.01 and following, R.R.S. 1943 (Reissue 1962) be, and it hereby is, declared and determined to be unconstitutional, unenforceable and void for the reasons herein found; that it is declared and determined plaintiff and persons in the position of plaintiff are free to seek public employment on their merits and

without disqualification on the basis of said oath requirement; that said oath (or similar affirmation) may not lawfully be required of public employees; and that plaintiff have and recover from the defendant the sum of $65.11 together with costs of action.

Dated April 17th, 1967.

/s/ HERBERT A. RONIN
District Judge

Gallagher* v. *Smiley

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 66-C-608

ALAN C. GALLAGHER,

Plaintiff,

—VS.—

JOSEPH R. SMILEY, THE REGENTS OF THE UNIVERSITY OF COLORADO; W. E. BRIGGS and DUKE W. DUNBAR, as Attorney General of the State of Colorado,

Defendants.

MEMORANDUM OPINION AND ORDER

Messrs. William F. Reynard and John D. Herron, Attorneys at Law, 1206 Denver U. S. National Center, Denver, Colorado, for Plaintiffs; John P. Holloway, Resident Counsel for the University of Colorado and Assistant Attorney General for the State of Colorado, Box 13—Regent Hall, Boulder, Colorado, for Defendants.

Before:

HICKEY, *Circuit Judge*,
CHILSON and DOYLE, *District Judges*.

CHILSON, *District Judge*:

The plaintiff instituted this action to enjoin the enforcement of a Colorado Statute (C. R. S. 1963, Chapter 123

Article 17 Sections 6, 7 and 8) which provides, among other things, that a teacher employed to teach at a university in Colorado shall take the loyalty oath which is set forth in the statute and that any person in charge of a university who shall permit any teacher to teach without taking the oath shall be guilty of a misdemeanor.

A Three Judge Court was convened pursuant to Title 28 U. S. C. §2281.

The matter came on for hearing before the Court on April 13, 1967, at which time counsel for the plaintiff and defendants filed an agreed statement of facts. Briefly stated, the agreed facts are that the defendant Mr. Smiley is the President of the University of Colorado; the defendant Regents of the University is the corporate body having supervision of the University of Colorado; defendant Mr. Briggs has the duty of employing and discharging teachers at the University of Colorado; defendant Mr. Dunbar is Attorney General of the State of Colorado and has the duty of enforcing and interpreting on behalf of state officials the statutes of the State of Colorado and is the legal advisor of the Board of Regents; plaintiff is a teacher at the University of Colorado; Mr. Briggs, at the direction of the Regents and upon the advice of Mr. Dunbar, has demanded that plaintiff execute an oath in the form provided in the aforementioned statute as a condition precedent to continuing in the discharge of his duties as a university teacher; the plaintiff refused to take the oath and was thereupon notified in writing "to discontinue giving that instruction and discharging those duties which were contemplated when your faculty employment as lecturer in physics was initiated."

The evidence also discloses that on February 17, 1967 the Regents of the University of Colorado adopted a resolution prescribing a different form of oath than that required by the statute. The defendants have moved to dismiss the complaint on the ground the controversy is moot citing the resolution of February 17, 1967 and stating, "... said Regents no longer require plaintiff's compliance with 123-17-6 through 123-17-8, C. R. S. '63, which they had heretofore adopted verbatim."

The defendants have also moved to dismiss the complaint upon several other grounds.

The Court determines the case is not moot as there is no assurance that the Board of Regents will not at some time in the future require the plaintiff to take the oath prescribed by the statute. *Morris* v. *Williams,* 149 F. 2d 703 (8th Cir. 1945); *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (2nd Cir. 1945). The Court concludes that the motions to dismiss should be denied and the case should be determined upon its merits.

The facts as above set forth are adopted as the finding of fact of the Court.

The Court concludes as a matter of law that the statute requiring the plaintiff to take the oath in question, when construed in the light of *Baggett* v. *Bullitt,* 377 U. S. 360 (1964) is violative of due process because the oath is unduly vague, uncertain and broad and that a permanent injunction should issue prohibiting the defendants from requiring the plaintiff to take it.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendants and each of them and their successors in office

are hereby perpetually enjoined from requiring the plaintiff to take, subscribe to or execute the oath set forth in Colorado Revised Statutes 1963, Chapter 123 Article 17 Section 6 and from interfering in any way with the continuation by the plaintiff of his duties as a lecturer in physics at the University of Colorado because of the plaintiff's failure to take, subscribe to or execute said oath.

ENTERED this 24th day of April, 1967.

BY THE COURT:

/s/ JOHN J. HICKEY, *Circuit Judge*
/s/ HATFIELD CHILSON, *District Judge*
/s/ WILLIAM E. DOYLE, *District Judge*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 25

HOWARD JOSEPH WHITEHILL,
Appellant,

v.

WILSON ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND, AND THE BOARD OF REGENTS, UNIVERSITY OF MARYLAND,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE APPELLEES

FRANCIS B. BURCH,
Attorney General of Maryland,
1200 One Charles Center,
Baltimore, Maryland 21201,

LORING E. HAWES,
Assistant Attorney General of Maryland,
1200 One Charles Center,
Baltimore, Maryland 21201,

For Appellees.

The Daily Record Co., Baltimore, Md. 21203

INDEX

Table of Contents

	PAGE
Opinions Below	1
Jurisdiction	1
Constitutional Provisions, Statutes and Administrative Requirements	2
Questions Presented	2
Statement	2
Summary of Argument	4
Argument:	
I. The "Certification of Applicant for Public Employment" required of the Appellant by his prospective employer, the University of Maryland, is not unconstitutionally vague and uncertain in violation of due process of law	6
II. The Maryland "Certification" is not an unconstitutional infringement on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution	18
III. The requirement of the Maryland "Certification" does not violate due process of law for lack of procedural safeguards, for lack of a hearing on the issue of loyalty or by shifting the burden of proof of loyalty onto the Applicant	23
IV. The required "Certification" does not constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution	26
Conclusion	28

Table of Authorities

Cases

	PAGE
Adler v. Board, 342 U.S. 485	8
American Communications Assoc. v. Douds, 339 U.S. 382	19, 21
Baggett v. Bullitt, 377 U.S. 360	9, 10, 18, 20
Beilan v. Board, 357 U.S. 399	8
Cramp v. Board, 368 U.S. 278	4, 9
Cromwell v. Jackson, 188 Md. 8, 52 A. 2d 79	14
Cummings v. Missouri, 71 U.S. (4 Wall) 277	26
Dennis v. U.S., 341 U.S. 494	9
Elfbrandt v. Russell, 384 U.S. 11	8, 18
Ex Parte Garland, 71 U.S. (4 Wall) 333	27
Franczkowski v. State, 239 Md. 126, 210 A. 2d 504, 6 A.L.R. 3d 238 (1965)	22
Garner v. Board, 341 U.S. 716	8, 19, 20, 21, 24, 26
Gerende v. Board, 341 U.S. 56, 71 S. Ct. 565, 95 L. Ed. 745, *reh. den.* 341 U.S. 923, 71 S. Ct. 741, 95 L. Ed. 1356 (1951)	4, 6, 7, 8, 10, 11, 14, 15, 16, 19, 21, 26
Heubeck v. City of Balto., 205 Md. 203, 107 A. 2d 99	14
Keyishian v. Board, 385 U.S. 589	9, 11, 21, 23
Kirkwood v. Provident Savings Bank, 205 Md. 48, 106 A. 2d 103 (1954)	12
Konigsberg v. State Bar of Calif., 366 U.S. 36	5, 23, 24, 25, 26
Lerner v. Casey, 357 U.S. 468	8
Nelson v. Los Angeles County, 362 U.S. 1	8
Police Comm. v. Siegel Enterprises, Inc., 223 Md. 110, 162 A. 2d 727, *cert. den.* 364 U.S. 909	14
Shelton v. Tucker, 364 U.S. 479	9
Shub v. Simpson, 196 Md. 177, 76 A. 2d 332 (1950, appeal dismissed, 340 U.S. 881)	7, 15
Slochower v. Board, 350 U.S. 551	8, 9
Speiser v. Randall, 357 U.S. 513	5, 20, 24, 25

PAGE

Stevens v. City of Salisbury, 240 Md. 556, 214 A. 2d 775 (1965) 12
Torcaso v. Watkins, 367 U.S. 488 9
United Public Workers v. Mitchell, 330 U.S. 75 19
United States v. Lovett, 328 U.S. 303 ..... 26, 27
Wieman v. Updegraff, 344 U.S. 183 ..... 8, 9, 26
Wiley v. State, 237 Md. 560, 207 A. 2d 478 (1965) 22
Yates v. U.S., 354 U.S. 298 9

Constitution, Federal and State Statutes

Constitution of the United States:
Article I, § 10 ..... 2, 26
Article VI 5, 18, 24
First Amendment 2, 18, 23
Fourteenth Amendment 2, 18

Federal Statutes:
18 U.S.C. 2385, § 2 (Smith Act) 9
28 U.S.C. § 1253 2

State Statutes:
Annotated Code of Maryland (1957 Edition)—
Article 85A, Sections 1-18 (Ober Law) ..... *passim*
1949 Laws of Maryland (Ober Law)—
Chapter 86 ..... 2, 14, 15
New York Civil Service Law—
§ 105 11
New York Education Law—
§§ 3021, 3022 11

Miscellaneous

Amsterdam, *The Void for Vagueness Doctrine*, 109 U. Pa. L. Rev. 67 (1960) 18
Black's Law Dictionary 22
30 C.J.S. 700 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 25

HOWARD JOSEPH WHITEHILL,

Appellant,

v.

WILSON ELKINS, PRESIDENT, UNIVERSITY OF MARYLAND, AND THE BOARD OF REGENTS, UNIVERSITY OF MARYLAND,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE APPELLEES

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland and the special concurrence of Judge Sobeloff were rendered on September 8, 1966, and are reported at 258 F. Supp. 589. The opinions and the judgment and final order in this case are also set out in the Record at pp. 63-78.

JURISDICTION

This Court has jurisdiction to review the decision of the United States District Court for the District of Mary-

land by direct appeal pursuant to Title 28, U. S. Code, Section 1253.

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REQUIREMENTS

1. Article 1, Section 10 and First and Fourteenth Amendments to the Constitution of the United States.

2. Article 85A, Annotated Code of Maryland (1957 Edition); Chapter 86, 1949 Laws of Maryland.

3. "Certification of Applicant for Public Employment", required of Appellant by University of Maryland.

QUESTIONS PRESENTED

1. Is the "Certification of Applicant for Public Employment" required of the Appellant by his prospective employer, the University of Maryland, unconstitutionally vague and uncertain in violation of due process of law?

2. Is the Maryland "Certification" an unconstitutional infringement on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution?

3. Does the requirement of the Maryland "Certification" violate due process of law for lack of procedural safeguards, for lack of a hearing on the issue of loyalty or by shifting the burden of proof of loyalty onto the applicant?

4. Does the required "Certification" constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution?

STATEMENT

This is a direct appeal from the final judgment and order entered on September 8, 1966 by the United States District Court for the District of Maryland, specially constituted

as a Three Judge Court, dismissing Appellant's complaint which sought to enjoin the Appellees from requiring the Appellant to execute a "Certification of Applicant for Publice Employment", as a condition precedent to employment by the Appellees. The Appellant, a university lecturer in creative writing, applied to the University of Maryland for a position as visiting lecturer in English during the academic year of 1966-67. During contract negotiations, Appellant made it clear that he would refuse to execute a so-called loyalty pledge required by the University entitled "Certification of Applicant for Public Employment". The University thereupon declined his appointment on the basis of his refusal to sign the certification as a condition precedent to his appointment.

The "Certification of Applicant for Public Employment" which the Appellant refused to sign reads as follows:

> "I, ...: do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 Edition)."

No oath or affirmation is required. The Maryland certification is not strictly a loyalty oath, does not call for an oath of allegiance and merely requires certification that the applicant is not engaged in an attempt to overthrow the Government. The present form of the oath was prescribed by the Attorney General of Maryland as being the maximum certification required by the Maryland Subversive Activities Act of 1949, Article 85A, Annotated Code of Maryland, 1957 Edition, in the light of recent

decisions of this Court. The latest revision of the Maryland loyalty pledge was officially prescribed by the Attorney General in a letter dated May 13, 1966 to Governor J. Millard Tawes, a copy of which letter is included in the Appendix to Appellant's Brief.

SUMMARY OF ARGUMENT

I.

The "Certification of Applicant for Public Employment" required of the Appellant by his prospective employer, the University of Maryland, is not unconstitutionally vague, uncertain and broad in violation of due process of law. The precise language of the Maryland oath has been held *not* to be vague and uncertain by this Court in *Gerende v. Board*, 341 U.S. 56, a *per curiam* opinion, without dissent, where the vagueness issue respecting a Maryland loyalty oath was before the Court.

Obiter dictum in the majority opinion in *Cramp v. Board*, 368 U.S. 278, indicated that this Court did not consider such language as vague, as distinguished from other language not "susceptible of objective measurement."

The Maryland loyalty certification does not contain any of the language condemned by this Court in prior decisions as vague and uncertain.

The Maryland certification is self-contained. Reference to overbroad definitions in the underlying statute requiring the certification, fatal to other oaths before this Court, is not a factor here.

The Maryland statute is severable, and only the required certification prescribed by the Attorney General of Maryland as meeting fully the statutory requirements, is before this Court.

II.

The Maryland "Certification" is not an unconstitutional infringement upon First and Fourteenth Amendment freedoms of expression, belief and association. This Court has distinguished the Maryland oath from others having such constitutional infirmities in previous cases. The Maryland certification applies only to acts; that is, engagement in an attempt to overthrow the government by force or violence. It constitutes no more infringement upon beliefs, expression and rights of association than the oath to support the Constitution required of all State and Federal legislative, executive and judicial officers by Article VI of the Constitution of the United States.

III.

The requirement of Maryland's "Certification" as a pre-condition to employment does not offend due process of law. An oath required as a condition precedent to employment by a State, where the oath is neither vague nor a penalty for certain beliefs and other protected First Amendment freedoms, does not violate due process of law for lack of procedural safeguards such as lack of a hearing or shifting of burden of proof onto the applicant. *Speiser v. Randall*, 357 U.S. 513; *Konigsberg v. State Bar of Calif.*, 366 U.S. 36.

IV.

The Maryland "Certification" does not constitute an unconstitutional "bill of attainder" under prior rulings of this Court. The certification is not intended to, and does not, inflict punishment upon a class of persons for past associations or other past conduct. The certification is a valid pre-condition of employment directly related to the fitness or capacity of the applicant for the position.

ARGUMENT

I.

THE "CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT" REQUIRED OF THE APPELLANT BY HIS PROSPECTIVE EMPLOYER, THE UNIVERSITY OF MARYLAND, IS NOT UNCONSTITUTIONALLY VAGUE AND UNCERTAIN IN VIOLATION OF DUE PROCESS OF LAW.

The certification the Appellant was requested to sign merely contains a denial that the applicant is in any way engaged in an attempt to overthrow the government by force or violence. Nothing more is required. If loyalty oaths have any vitality whatsoever, it is difficult to conceive of one having more clear, concise and unambiguous language. Perhaps, the fact that the Appellant's specialty is creative writing leads him to distrust the ordinary meaning of words.

This Court, without dissent, declared the language of the Maryland oath to be free of constitutional infirmities in *Gerende v. Board*, 341 U.S. 56, 71 S. Ct. 565, 95 L. Ed. 745, reh. den. 341 U.S. 923, 71 S. Ct. 741, 95 L. Ed. 1356 (1951). The Court stated at pages 56 and 57, as follows:

> "We read this decision to hold that to obtain a place on the Maryland ballot a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances, and with this understanding the judgment of the Maryland Court of Appeals is affirmed."

The Maryland decision to which the Court referred was *Shub v. Simpson*, 196 Md. 177, 76 A. 2d 332 (1950), appeal dismissed, 340 U.S. 881. In that case the Maryland Court of Appeals declared that the purpose of the Ober Law was:

> ". . . to prevent infiltration in our State, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government by force or violence. We construe the affidavit required by Sec. 15 with respect to those desiring to become candidates for public office as a means of preventing such infiltration at its initial stage, thereby preventing confusion among the electors and that it is, in no sense, an additional oath of office."

All of the grounds for attacking the constitutionality of the present Maryland oath were before this court in the *Gerende* case (See Brief of Appellant, No. 577, October Term, 1950). This Court at that time had no difficulty in finding that there was neither vagueness nor uncertainty in an oath that an applicant "is not a person who is engaged in one way or another in the attempt to overthrow the government by force or violence". *Gerende, supra.* The Court further indicated that such an oath would be acceptable to the Court with the understanding that the Attorney General of the State of Maryland "would advise the proper authorities to accept an affidavit in these terms *as satisfying in full the statutory requirement*". (Emphasis supplied.) *Ibid.* The Appellant in the case at bar refused to sign such a certification prescribed by the Attorney General to State agencies as meeting State and constitutional requirements (See letter from Attorney General to Governor, May 13, 1966, in Appendix to Appellant's Brief, p. 17a).

The Constitution has not been amended since 1951 with respect to any Article or Section at issue here. It is opinions of the Supreme Court, *seriatim* that we are expounding.

From 1951 through June, 1966, this Court consistently held that the State may condition public employment upon its employee's abstaining from knowing membership in the Communist Party and other organizations advocating the overthrow of the government by force or violence; that the State may inquire into such membership; that the State may condition public employment upon refusal to answer inquiries about such affiliations; and lastly that a State may condition employment upon the employee's refraining from actual engagement and participation in an attempt to overthrow the government by force or violence. *Gerende, supra; Adler v. Board,* 342 U.S. 485; *Beilan v. Board,* 357 U.S. 399; *Lerner v. Casey,* 357 U.S. 468; *Nelson v. Los Angeles County,* 362 U.S. 1; *Wieman v. Updegraff,* 344 U.S. 183; *Garner v. Board,* 341 U.S. 716; *Slochower v. Board,* 350 U.S. 551. In 1966, *Elfbrandt v. Russell,* 384 U.S. 11, added the additional qualification that knowing membership in the Communist Party or other such organization is not grounds for refusal of public employment or dismissal absent a showing of specific intent to further the illegal aims of the organization.

No case has held that the State may not condition public employment upon the employee's refraining from actual engagement and participation in an attempt to overthrow the government by force and violence.

Constitutional protection extends only to the applicant whose exclusion from public employment is arbitrary, discriminatory and unreasonable. *Wieman v. Updegraff, supra;*

Slochower, supra; Torcaso v. Watkins, 367 U.S. 488; *Baggett v. Bullitt,* 377 U.S. 360; *Cramp v. Board,* 368 U.S. 278; *Shelton v. Tucker,* 364 U.S. 479; *Keyishian v. Board,* 385 U.S. 589. In *Weiman v. Updegraff, supra,* this Court stated as follows:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. 183, 192.

The Maryland certification meets the test previously laid down by this Court on the vagueness question; namely, whether or not the oath was lacking in "term susceptible of objective measurement". *Cramp v. Board, supra,* 368 U.S. 278, 286; *Baggett v. Bullitt, supra,* 377 U.S. 360, 367. In *Cramp,* Mr. Justice Stewart remarked:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government . . . The provision is completely lacking *in these or any other terms susceptible of objective measurement.*" (Emphasis supplied.) 368 U.S. 278, 286.

Further support for the clarity of the oath may be found in *Yates v. U. S.,* 354 U.S. 298, where the Court in reversing convictions under the Smith Act, 18 U.S.C. 2385, Section 2, stated exactly what the terms thereof do and do not proscribe:

> "The Smith Act reaches only advocacy of action for the overthrow of government by force and violence" 344 U.S. 298, 324. See also *Baggett, supra,* 377 U.S. 360, 370, n. 8; and *Dennis v. U. S.,* 341 U.S. 494 (upholding Section 2 of the Smith Act over a vagueness challenge):

Certainly if "advocacy of action for the overthrow of government by force and violence" is understood by this Supreme Court and has been determined to be free of vagueness and uncertainty when applied in concrete situations, the language of the Maryland oath presented to the Appellant, must likewise pass muster.

However, Appellant, a creative writing specialist, insists that resort must be had to "legislative gloss" to understand the true meaning of the oath and all of its nefarious implications. This resort to legislative gloss is self-induced confusion designed to rationalize an intended result; namely, violation of due process of law. The Maryland oath was carefully drafted by the Attorney General to avoid the very pitfalls of interpretation from which the Appellant seeks to benefit here.

Compare for example the Washington oath as proscribed in *Baggett, supra,* at page 364, 5. The oath calls for a sworn statement that the oath taken is not a "subversive person" as defined in the Washington Subversive Activities Act. There are no qualifying words. The definition of "subversive person" in the Washington Act is identical to that in Maryland's Ober Law except for the last clause relating to membership in subversive organizations. But the Maryland oath does not require the Applicant to certify that he is "not a subversive person as defined in the Act." This basic distinction was recognized by the Court in *Baggett* in note 7, page 368.[1]

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[1] "7. The contention that the Court found no constitutional difficulties with identical definitions of subversive person and subversive organizations in Gerende v. Board of Supervisors, 341 U.S. 56, 95 L. ed. 745, 71 S. Ct. 565, is without merit. It was forcefully argued in Gerende that candidates for state office in Maryland were required to take an oath incorporating a section of the Maryland statutes defining subversive person and organization in the identical terms

The vices of vagueness condemned in *Keyishian, supra,* do not exist here. Those vices consisted of "a regulatory maze". "Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross references to interrelated enactments and rules." 385 U.S. 589, 604,

First there was the Feinberg certificate issued pursuant to rules and regulations of the Board of Regents. Then the Feinberg certificate was rescinded; and in lieu thereof, the applicant was required to be informed that Sections 3021 and 3022 of the Education Law and Section 105 of the Civil Service Law constituted part of this contract. Subversive organizations were listed. The statutes referred to "treasonable or seditious" utterances or acts. The Civil Service Law referred to definitions in the Penal Law, such as "criminal anarchy" and "advocacy of criminal anarchy". Section 105 (1)(a) bars employment of any person who "by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government. Section 105 (1)(b) proscribes distribution of written material "containing or advocating, advising or teaching the doctrine" of forceful overthrow of government. The Court further remarked that it did not have the benefit of "judicial gloss" to enlighten it as to the scope of this complicated plan. At page 601. (Cf. *Gerende, supra.*)

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challenged herein. But the Court rejected this interpretation of Maryland law and did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes. Instead it made very clear that the judgment below was affirmed solely on the basis that the actual oath to be imposed under Maryland law requires one to swear that he is not a person who is engaged 'in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt." Id. at 56-57, 95 L. ed. at 746. (Emphasis in original.)

Condemning the "very intricacy of the plan and the uncertainly as to the scope of its proscriptions", this Court described the New York loyalty program as "a highly efficient *in terrorem* mechanism." *Ibid.*

The fact that the Attorney General of Maryland following the mandate of this Court in *Gerende*, has advised the proper authorities to accept an affidavit in a more restricted form than originally contemplated by the Ober Law, *as satisfying in full the statutory requirement*, should dispense with the necessity of reviewing the constitutionality of the Ober Law in its original form. This Court sits to decide cases, not manipulate abstractions. Appellant, nevertheless, urges review of the "underlying statutory provisions" in pristine form because he challenges the right of the University of Maryland to require the certification in the restricted form as satisfying the statute and also he challenges the fact that the severability clause of the Act was ever made operative so as to permit statutory requirements less than the maximum under the Act. These challenges should rightfully be answered by the Maryland Court of Appeals. Nevertheless that Court has consistently upheld statutes as constitutional, if any construction thereof will sustain the validity of the legislative act. *Stevens v. City of Salisbury*, 240 Md. 556, 214 A. 2d 775 (1965); *Kirkwood v. Provident Savings Bank*, 205 Md. 48, 106 A. 2d 103 (1954).

A construction which eliminates words or phrases offending the Constitution of the United States will be favored, where severability is permitted by the law and the statute is not so emasculated that the legislative purpose cannot be carried out.

Both the Maryland Attorney General and the Supreme Court in 1951 understood the Maryland Court of Appeals to have restricted the term "subversive person", as defined

in the Ober Law, to mean a person who is "engaged in one way or another in the attempt to overthrow the government by force and violence", and knowingly a member of an organization engaged in such an attempt. Thus restricted, the Act had sufficient vitality to support the restricted form of affidavit.

Under Section 11 of the Ober Law, the Applicant is required to sign a written statement, under penalties of perjury, containing answers to material inquiries by the agency of the State of Maryland to enable the agency to determine whether or not the applicant is a subversive person. Since the Attorney General is legal adviser to State agencies, the certification required by the agency was prescribed by the Attorney General in the light of constitutional interpretations of the Supreme Court. The Attorney General could do this because the Act is severable in its provisions.

Appellant further challenges the severability of Article 85A in spite of Section 18, which reads as follows:

> "If any provision, phrase, or clause of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions, phrases, or clauses or applications of this article which can be given effect without the invalid provision, phrase, or clause or application, and to this end the provisions, phrases and clauses of this article are declared to be severable."

His argument is that severability clauses are of no avail when "the valid and invalid portions of a statute are so inextricably intertwined, connected and inter-dependent in subject matter and purpose as to preclude the presumption that the legislature would have passed one portion without the others" (Appellant's Brief, page 42). The Court below rightly rejected this contention as applied to

the case at bar. The Maryland Law applicable to severability clauses in general is as follows:

> "In the absence of a severability clause, a presumption is raised that the legislature intends the act to be effective as an entirety. If there be a saving clause, an opposite presumption of separability is raised, 11 *Amer. Jur., Constitutional Law,* sec. 156, p. 847, 2 Sutherland, *Statutory Construction,* sec. 2409; but the saving clause is not absolute or an inexorable command, for it is merely an aid to interpretation. It must be afforded a reasonable interpretation, but does not operate to save provisions which clearly would not have been enacted into law except upon the assumption that the entire act was valid. The true test of separability is the effectiveness of an act to carry out, without its invalid portions, the original legislative intent in enacting it; and a saving clause will not be given effect where such invalid provisions affect the dominant aim of the whole statute."

See also *Police Comm. v. Siegel Enterprises, Inc.*, 223 Md. 110, 162 A. 2d 727, cert. den. 364 U.S. 909; *Cromwell v. Jackson,* 188 Md. 8, 52 A. 2d 79; *Heubeck v. City of Baltimore,* 205 Md. 203, 107 A. 2d 99.

The oath as modified by *Gerende* and subsequently by the Attorney General quite precisely promote the stated purpose of the Ober Law as expressed in the title, Chapter 86, 1949 Laws of Maryland.

> "An Act to add a new Article . . . making it a crime to commit acts or advocate acts intended to effect the overthrow of the Government of the United States or the State of Maryland or of any political subdivision thereof by violence or other unlawful means, or to attempt or conspire so to do, relating to subversive organizations generally, to the loyalty of candidates for public office and of officers and employees of the State or of any political subdivision thereof . . .".

More important than the title to the Act is the construction placed upon the Act by the Maryland Court of Appeals. Rejecting the contention of the appellant in *Shub* that the addition of the word "revolution" to the words "force or violence" prohibits anyone from advocating or teaching the alteration of the form of government by a *peaceful* revolution, the Maryland Court admonished the appellants that the words of the statute must be construed together and in the light of the title which uses the words "violence or other unlawful means". 196 Md. 177, 190, 191. Rejecting the contention that Section 15 was overbroad, the Court said:

> "It is easy to be meticulous when you are attempting to dissect a statute and are trying to evade its provisions, but the proper rules of statutory construction require that all of its provision be interpreted in accordance with the intent and meaning of the entire enactment. . . . The purpose of Section 11 of Article 15 of the Constitution, and of Chapter 86 of the Acts of 1949, is the same and they are construed together to effect that purpose. That is to prevent infiltration in our state, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence*. . . ." 196 Md. 177, 191, 192.

The foregoing should dispel any doubt on the part of this Court that the Maryland Court of Appeals would find the oath presented to Appellant to be repugnant to the intent of the Act, when the oath is practically word for word what the Court of Appeals said the Act meant.

As stated by the Deputy Attorney General, Robert C. Murphy, at the argument before the District Court below, there have been but two forms of oath prescribed by the Attorney General for use by State agencies since *Gerende*

was decided in 1951 (R. 35). The oath used from 1951 until May, 1966 (when Elfbrandt was decided) read as follows:

> "I ..... do hereby certify that I am not a subversive person as defined by law; namely, that I am not a person who is engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence, and I am not knowingly a member of an organization engaged in such an attempt."

There is no factual basis in the record before this Court supporting Appellant's statement in his Brief at page 15 that "until recently the Court's understanding in *Gerende* was not even closely followed by the long succession of Maryland Attorneys General." The fact is that the certification quoted above as having been prescribed between 1951 and 1966 does, in fact, limit the legal definition of "subversive person" in the precise manner prescribed in *Gerende*. The only reasonably construction is that "subversive person as defined by law" means and is limited to that which follows "namely" in the oath. This was the limitation placed upon the oath by judicial construction.

Nevertheless, in 1966 a change was dictated by Elfbrandt with respect to "knowing membership" in organizations engaged in overthrowing the government. The fact that the oath was further limited in 1966 by the Attorney General rather than by the courts does not give the Appellant the right to choose the language of the oath he wishes to challenge before this Court. Judge Winter dispensed with this argument in the Court below, as follows:

> "This argument overlooks Section 18 of Article 85A, as clear an expression of severability as could be found. Moreover, as the chief legal officer of the State of Maryland, sworn to uphold the Constitution of the United States as well as the Constitution and

laws of the State of Maryland, Maryland Constitution, Article I, Section 6, the Attorney General acted properly within the scope of his authority in advising that those portions of the oath prescribed by Article 85A repugnant to decided cases of the Supreme Court of the United States should not be required of state employees, even in the absence of specific court decree" (R. 74).

Judge Winter might also have added that the Attorney General under his constitutional powers cited above, might properly advise the State Agency (University of Maryland) concerning the constitutionality and legal sufficiency of any written statement (under penalty of perjury) the agency may require an applicant to execute pursuant to Section 11 of the Ober Law (Code, Article 85A).

Appellant also argued that the oath sought to be exacted from him is not limited to its own test but, rather, extends to the full oath purportedly required by Article 85A. The Court below dispensed with this contention as follows:

> "The first portion of the argument rests upon the assertion that, in the certificate plaintiff was asked to execute, the reference to 'Art. 85A, paragraph 13, Annotated Code of Maryland, 1957' after the phrase 'Required by law' means that the certification following, which, on its face, is limited to engaging in one way or another in the attempt to overthrow the government by force or violence, embodies aspects of the oath prescribed by statute which are clearly invalid under the Supreme Court decisions. We are not persuaded" (R. 73).

Quite obviously paragraph 13 has no relevancy whatsoever to Appellant's situation as an applicant, since he was not an employee in 1949. The authority for requiring Appellant to execute the certification is found in Section 11. Apparently in reprinting the oath prescribed by the

Attorney General in May, 1966, the University retained the heading from the original Ober oath exacted of persons in State service when the Ober Act was passed.

Finally, the Appellee contends that the Maryland certification is no more vague — and perhaps is far clearer — than the oath of office that Article VI of the United States Constitution requires to be taken by all legislative, judicial and executive officers, *both of the United States and of the several States;* namely, "to support this Constitution." (Emphasis supplied.) It is submitted that all of the self-interrogation of this Court leading to its conclusion that somewhere, someone might misunderstand the Washington or Arizona oaths in *Baggett* and *Elfbrandt, supra,* could be directed likewise to anyone taking the oath to support the constitution. Can a member of the Communist Party take such an oath in good faith? This Court should construe the simplified Maryland oath with the Constitutional oath in mind; for the constitutional test of what is and what is not vague and indefinite is far from clear at this juncture. See Amsterdam, *The Void for Vagueness Doctrine,* 109 U. Pa. L. Rev. 67 (1960).

II.

THE MARYLAND "CERTIFICATION" IS NOT AN UNCONSTITUTIONAL INFRINGEMENT ON FREEDOM OF EXPRESSION, BELIEF, ASSOCIATION, AND ACADEMIC FREEDOM IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Maryland "Certification of Applicant for Public Employment" does not reach beliefs or constitutionally protected expression and association. The certification is directed to specific acts of a person engaged in the overthrow of his government by force or violence.

If a person were to put down on paper, in the course of an actual plot to assassinate the Governor, detailed instruc-

tions to other members of such a conspiracy regarding the means of entry and destruction by explosives of the Governor's mansion, clearly neither the written instructions nor the association of such person in the conspiracy would be constitutionally protected.

It is, of course, well settled that the constitutional right of liberty of speech is subject to reasonable regulations as are necessary to promote and preserve the public welfare and safety. It is equally well settled that the State may require, as a condition of employment with it, that individuals seeking such employment execute a valid loyalty certification, such requirement being a reasonable regulation to protect the State service, to establish an employment qualification of loyalty to the State, and to the United States. *Garner v. Board of Public Works, supra; Gerende v. Board of Supervisors of Elections, supra; American Communications Association v. Douds,* 339 U.S. 382. More specifically, as stated in Garner, at page 720:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness, past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. . . ."

See also *United Public Workers v. Mitchell,* 330 U.S. 75, upholding the constitutionality of the congressional enactment restricting political activity of Federal Civil Service employees.

The right of the State to require a proper certification of loyalty has been expressly upheld even in those cases where particular oaths have been declared unconstitution-

ally vague. See *Baggett v. Bullitt, supra,* at page 379, wherein it is noted:

> "As in *Cramp v. Board of Public Instruction, supra,* we do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct."

As even more succinctly stated by Mr. Justice Frankfurter in *Garner,* in his separate concurring opinion, at page 725:

> ". . . No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence. . . ."

Appellant, as an applicant for public employment in Maryland, declined to subscribe to the statement that "I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence."

Having determined that this certification is not unconstitutionally vague, it can hardly be denied that it constitutes a valid standard of qualification and eligibility for public employment by seeking, as it does, to prevent employment of persons engaged in an attempt to overthrow the government by force or violence.

The case of *Speiser v. Randall,* 357 U.S. 513 manifests the significance of this different purpose. There, a loyalty oath was required as a condition for eligibility for a veteran's tax exemption. The Supreme Court struck down this provision on the ground that its enforcement would place the burden of proof of nonadvocacy of violent overthrow on the taxpayer and as such would violate due process. The Court was careful, however, to delineate the differences between the *Speiser* situation, where the oath was used to penalize people for holding certain ideas, and

situations where, as here, a loyalty certification is required only as a condition for public employment. Referring to the *Garner*, *Gerende*, and *Douds* cases, *supra*, the Court said:

> "In these cases however there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. . . . The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be used to the detriment of the public." 357 U.S. at 527.

Actually the first three arguments herein are essentially interrelated because if the language of the oath is not vague and uncertain or if the oath is not so broad that it reaches protected speech and other forms of expression, then the due process requirements become significant (See the thread of argument in *Keyishian*, where while essentially discussing vagueness, the Court touches base on the second and third arguments herein).

Consequently, in further rebuttal of Appellant's first three contentions, the language of the oath should be examined to see the extent that free speech, in particular, may or may not be inhibited by it.

Since "overthrow of the government by force or violence" has never given this Court any difficulty in interpretation, the terms "engaged in" and "attempt" will be examined, as well as the phrase "in one way or another".

With respect to the latter phrase, during arguments, Mr. Murphy indicated that about the best definition he could think of was "in any way" (R. 41). This is entirely reasonable. The spectacle of the Attorney General wriggling on a pin while explaining the meaning of "in one way or

another" is no less exciting (See Appellant's Brief, p. 38) than having any member of this Court explain "deliberate speed" or "invidious discrimination" and other such precisely measurable expressions emanating from this Court, which expression are supposed to guide state officials in the exact science of government. Since there is no ready-made formula for overthrowing governments, it is not vagueness, but rather good sense, to recognize that one person's contribution to such a cause may differ from that of another, or may vary from time to time.

Under Maryland Law applicable to crimes, an "attempt" consists of an intent to commit the crime, the intentional doing of some act, beyond mere preparation, towards its commission, but short of its full consummation. *Franczkowski v. State,* 239 Md. 126, 210 A. 2d 504, 6 A.L.R. 3d 238 (1965); *Wiley v. State,* 237 Md. 560, 207 A. 2d 478 (1965).

Accordingly to Black's Law Dictionary and 30 C.J.S. 700, the word "engage" or "engaged" generally refers to a continuous occupation or participation in some type of activity, more than occasional participation or single act.

Taking "engaged" and "attempt" together in their commonly understood meanings, the term "engaged in an attempt" would seem to preclude mere speech or advocacy and quite definitely would mean some form of action intended by the actor to achieve a certain objective. In the case at bar, the action would be directed at violent overthrow of the government. The very fact of the post-Elfbrandt revision of the Maryland oath would further support the conclusion that the oath refers to actions and not mere words of advocacy, expression, teaching, and so forth.

III.

THE REQUIREMENT OF THE MARYLAND "CERTIFICATION" DOES NOT VIOLATE DUE PROCESS OF LAW FOR LACK OF PROCEDURAL SAFEGUARDS, FOR LACK OF A HEARING ON THE ISSUE OF LOYALTY OR BY SHIFTING THE BURDEN OF PROOF OF LOYALTY ONTO THE APPLICANT.

In *Keyishian*, this Court approved of the statement of the Court of Appeals for the Fourth Circuit that ". . . the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." 385 U.S. 589, 605, 606. Inherent in that statement is the proposition that public employment may be subjected to reasonable conditions. If the Maryland certification is neither vague and indefinite, nor unduly inhibitory of free expression protected by the First Amendment, then the oath must be a reasonable condition of public employment; for relating as it necessarily does to the fitness of the applicant as in the case of inquiries relating to disease, vices, crime record, and so forth, the certification amounts to legitimate inquiry. See *Konigsberg v. State Bar*, 366 U.S. 36.

Is an applicant for a position of teller in a national bank entitled to a hearing in which the employer must prove he is dishonest just as if he were a civil servant being discharged for embezzlement, or may his employer require him to certify prior to his employment certain facts relevant to his honesty as a condition of his employment? To hold that an applicant's "right" to be employed by a State is such that he is insulated from reasonably direct inquiries (subject to penalties for perjury) relating to his fitness as a future employee, and that the State has the burden of proving, without such inquiry, at a hearing, that such employee is unfit, is illogical. This Court has not gone that far. If this Court should so rule, every State would be-

come more like a police state because, not being able to ascertain what it seeks from the applicant, whether it be loyalty, health, honesty or vices, it must rely on the testimony of others and maintain a large investigatory apparatus to ascertain initial facts and leads. What is this Court's concept of a State and its proper role as employer?

Suppose a state judicial appointee refuses to make oath that he will support the Constitution of the United States as required by Article VI of the Constitution. Is the State required to permit the judge to commence his duties until the State "proves" at an evidentiary hearing that the judge will *not* support the Constitution?

Garner, supra, is still authority for the very reasonable proposition that a governmental employer may inquire of its employees as to matters that may prove relevant to their fitness and suitability for the public service (341 U.S. 716, 720), and loyalty to the State is relevant (341 U.S. 716, 721). In his concerning opinion in *Garner,* Mr. Justice Frankfurter said:

> "No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowing members of an organization engaged in such endeavor. See *Gerende v. Board . . .*"

Appellant relies heavily on *Speiser v. Randall, supra,* for his third argument. Speiser held unconstitutional a state procedural rule that in order to obtain an exemption a taxpayer must bear the burden of establishing that he did not advocate the violent overthrow of government. *Speiser* was distinguished in *Konigsberg v. State Bar, supra,* 366 U.S. 36, 54, where there was no attempt to penalize political beliefs or control speech, but rather to protect, from an evil shown to be grave, some interest clearly with-

in the sphere of governmental concern. In *Speiser* there was no overriding interest of the State to be protected, such as prevention of infiltration of persons attempting to overthrow the government by force or violence.

Likewise, the Court made manifest the distinctions on the burden of proof issue:

> "In the earlier cases . . . the loyalty oath once signed became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath he retained his position. The oath was not part of a device to shift to the office holder the burden of proving his right to retain his position. The signer, of course, could be prosecuted for perjury, but only in accordance with the strict procedural safeguards surrounding such criminal prosecutions. In the present case, however, it is clear that the declaration may be accepted on the basis of incompetent information or no information at all. It is only a step in a process throughout which the taxpayer must bear the burden of proof." 357 U.S. 513, 528.

In *Konigsberg v. State Bar of California, supra,* the Court was careful to demonstrate that the *Speiser* principle was limited to where there was intent to penalize certain beliefs and to effectuate such attempt by placing the burden of proof of nonadvocacy of violent overthrow on the Plaintiff, There, the Court upheld California's right to deny admission to the practice of law to an individual who refused to answer the bar examining committee's questions pertaining to membership in the communist party. The Court said at page 54:

> "*Speiser* was explicitly limited so as not to reach cases where, as here, there is no showing of an attempt to penalize political beliefs."

The Court also found that the burden of proof had not been shifted to petitioner merely because he was required to

testify before the committee and to submit to discovery in order to become a member of the bar. 366 U.S. at 55.

Furthermore, the Maryland certification is no more constitutionally offensive than a requirement common to many job applications that the applicant state whether or not he has a venereal disease or a mental or nervous disorder, or is a narcotics user or indulges in consumption of alcoholic beverages beyond a certain amount.

IV.

THE REQUIRED "CERTIFICATION" DOES NOT CONSTITUTE A BILL OF ATTAINDER IN VIOLATION OF ARTICLE 1, SECTION 10 OF THE UNITED STATES CONSTITUTION.

Appellant's argument that the required Certification of Applicant for Public Employment "constitutes an unconstitutional bill of attainder has consistently been rejected by this Court where that argument in similar cases has received consideration. *Gerende, supra; Garner, supra; Konigsberg v. State Bar, supra; Wieman v. Updegraff, supra.*

"A bill of attainder is a legislative act which inflicts punishment on an individual without a judicial trial". *U. S. v. Lovett,* 328 U.S. 303, 315, quoting from *Cummings v. Missouri,* 71 U.S. (4 Wall) 277, 323. The bill of attainder cases make it clear that incidental hardship caused by a valid regulatory scheme does not amount to "punishment"; whereas if the dominant purpose of the statute is to "inflict punishment", then it is a bill of attainder.

In *Garner* the Court stated that punishment is not imposed by a "general regulation which merely provides standards of qualification and eligibility for employment". 341 U.S. 716, 722. In *Cummings v. Missouri, supra,* the Court distinguished between a qualification or pre-condi-

tion for employment relating to the fitness or capacity of a person for the position and a pre-condition strictly in the nature of punishment for past actions not punishable at the time committed. In *Ex parte Garland*, 71 U.S. (4 Wall) 333, this Court stated:

> "The Legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the inflication of punishment, against the prohibition of the Constitution."

In *Lovett, supra*, the Congress refused to permit appropriated funds to be used for the payment of salaries of three named individuals after a particular date. This action was prompted by revelation of the Dies Committee that these persons, were by reason of their past associations and statements, considered by Congress to be subversive. The act was held to be both a bill of attainder and *ex post facto* in that it permitted the legislature to inflict penalties for past actions upon these individuals without judicial trial.

In the light of the cases cited hereinabove the "Certification" is not an unconstitutional bill of attainder. The Maryland certification relates to present acts, not past conduct; and, is intended to protect the State against infiltration persons engaged in violent overthrow of governmental authority, rather than to inflict punishment for past associations.

CONCLUSION

Under the interpretation placed upon recent rulings of this Court by the Appellant, Maryland must hire any applicant who is a known Communist party member, Nazi, Black Power fanatic or member of any organization that advocates destruction of our constitutional government by violent means such as murder, arson, assassination, etc., to teach our children in our public schools, or for any other job if otherwise qualified; and the State may not discharge such persons until it can prove in an adversary proceeding that such persons have a "specific intent" to overthrow the government by force and violence. Apparently the financial status of any such group (not receiving sufficient funds from abroad) is clearly assured if all of its members have a constitutional right to continued employment in any State in the Union until discharge proceedings producing the requisite evidence have withstood years of court appeals. The burden thus placed upon the State governments in sheltering and providing means of livelihood for the violent revolutionists in this nation is intolerable. Maryland is particularly concerned with its new role in this regard because of its proximity to the nation's capital.

Lacking a slick investigative organization such as the Federal Bureau of Investigation, Maryland has chosen to ascertain the loyalty of its employees and officers by means of the simple certification of non-engagement in an attempt to overthrow the government by force or violence. The *wisdom* of this method is not open to inquiry by the Federal judiciary. The wisdom of such legislation is solely for determination by the elected representative of the people of this State assembled in the State Legislature. The only questions before this Court involve the constitu-

tional limitations upon Maryland's use of the "Certification of Applicant for Public Employment" as a means of determining loyalty.

Based upon prior judicial construction of the operative words of the Maryland certification, and for the reasons set forth in the foregoing arguments, it is respectfully submitted that the Maryland certification required of the Appellant herein is free of the constitutional defects that have plagued loyalty oath procedures in other States. The judgment of the Court of Appeals for the Fourth Circuit, therefore, should be affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
1200 One Charles Center,
Baltimore, Maryland 21201,

LORING E. HAWES,
Assistant Attorney General
of Maryland,
1200 One Charles Center,
Baltimore, Maryland 21201,

For Appellees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 25

HOWARD JOSEPH WHITEHILL,
Appellant,

v.

WILSON ELKINS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF THE BALTIMORE METROPOLITAN CHAPTER OF AMERICANS FOR CONSTITUTIONAL ACTION

EDWARD O. MACKIE,
Sixth Floor Title Building,
Baltimore, Maryland 21202,
Attorney for Amicus Curiae.

The Daily Record Co., Baltimore, Md. 21203

INDEX

Table of Contents

	PAGE
Interest of Amicus	1
Statement of Facts	2
Summary of Argument	3
Argument:	
I. No One Has The Right To Employment On His Own Terms	4
II. A State, As An Employer, Has A Right To Require As A Condition Of Employment Acknowledgment Of Loyalty To It By Those Who Seek Employment	6
III. The Maryland Oath Is Reasonable	8
Conclusion	10

Table of Authorities

Cases

Adler v. Board of Education of the City of New York, 342 U.S. 485	5
Garner v. Board of Public Works of Los Angeles, 341 U.S. 716	6, 7
McAuliffe v. Mayor, etc. of the City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892)	4
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	5

Statutes

Md. Code Ann. Art. 85A (1964): Section 1 et seq.	2

Executive Orders

PAGE

President's Loyalty Order of March 22, 1947, Executive Order No. 9835, 12 Federal Register 1935 ... 5, 6, 7, 8

Authorities

Boorstin, Daniel J., "The Americans", Random House (1965) ... 10

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BRIEF OF THE BALTIMORE METROPOLITAN CHAPTER OF AMERICANS FOR CONSTITUTIONAL ACTION

The Baltimore Metropolitan Chapter of Americans For Constitutional Action appears Amicus, with consent of all parties, in support of the position advanced by Appellees.

INTEREST OF AMICUS

Americans For Constitution Action, of which the Baltimore Metropolitan Chapter is a part, is a non-partisan, non-profit nationwide organization. It was founded in 1959 by a group of citizens who believe our constitutional system of government, as it functions both at national and state

levels, provides the solid foundation upon which the structure of our free social order has been erected and that, if we are to preserve this order, its foundation must be protected against erosion or destruction.

The Baltimore Metropolitan Chapter of Americans For Constitutional Action has an interest in the present case in that its membership is composed of residents of the State of Maryland. Our objective is a defensive one, but we are convinced that an effective defense of what we seek to preserve is vital to the general welfare of Maryland and the United States. We view the State of Maryland in this case as an employer and, as such, vested with the right to require acknowledgments of loyalty to it by those persons who freely and voluntarily apply to enter the employ of the State.

STATEMENT OF FACTS

Appellant seeks to have declared unconstitutional the oath requirements of the Maryland Subversive Activities Act of 1949, 8A Annotated Code of Maryland (1964 Ed.), Article 85A, § 1 et seq., exacted of public employees as a condition precedent to public employment.

Appellant brings this action in consequence of appellees' refusal to employ him as a visiting lecturer at the University of Maryland, by reason of his having declined to sign the following certification:

> "I, ... do certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

Appellant contends that the requirement of the oath and the denial of employment to him in consequence of his refusal to sign the same, are unconstitutional infringements of his rights.

There is a singular absence from appellant's brief of any discussion of the rights of the State of Maryland as his prospective employer. It is therefore advisable to determine what those rights are before turning to an examination of the appellant's arguments concerning his rights, in order that his arguments may be seen in a more balanced perspective, viewed in relationship to an adequate consideration of the rights of the State as employer.

SUMMARY OF ARGUMENT

Amicus Curiae contends that all persons, including appellant, who instead of being self-employed seek to be employed by others, owe obligations of loyalty to those from whom they seek employment.

The State of Maryland as an employer has a right to require acknowledgments of loyalty to it to be made by those who freely and voluntarily seek to enter its employ.

We contend the State of Maryland and all it sub-divisions and agencies are maintained in existence by payment of taxes, license fees and other such imposts. We contend also that those who pay such taxes or license fees and imposts are the employers of all persons who freely and voluntarily choose to hold elective or appointive offices or other positions of profit or trust in the Government or in the administration of the business of the state or any of its sub-divisions or agencies. And, we contend that all persons who voluntarily hold any such offices or positions of profit or trust are employees of the taxpayers and that they owe obligations of loyalty to the taxpayers; and that

the taxpayers have a right to require acknowledgments of those obligations of loyalty from all their employees.

ARGUMENT

I.

NO ONE HAS THE RIGHT TO EMPLOYMENT BY A STATE ON HIS OWN TERMS.

It is established law that no one has the right to employment by the State on his own terms. The State, like any other employer, may place reasonable requirements upon its employees. The State, again like any other employer, may require its employees to refrain from conduct, the general prohibition of which would be unconstitutional.

McAuliffe v. Mayor etc. of the City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892), dealt with a police regulation which stated:

> "No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever."

The plaintiff was dismissed for violation of this regulation. His petition for reinstatement was dismissed.

Justice Oliver Wendell Holmes, speaking for the Court, stated:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any *reasonable* condition upon holding offices within its control. This condition seems to us *reasonable*, if that be a question open to revision here." (Emphasis added.)

The Supreme Court of the United States has made similar statements of the law. *United Public Workers of America v. Mitchell*, 330 U.S. 75, upheld the "Hatch Act," which forbade certain specific political activities on the part of federal employees. There the Court stated at page 101:

> "For regulation of employees it is not necessary that the act regulated be anything more than an act *reasonably* deemed by Congress to interfere with the public service." (Emphasis added.)

These cases clearly establish that government, State, Federal, or local may require that its employees refrain from conduct *reasonably* deemed detrimental to the public service, even though such conduct may include activities protected by the constitution.

A fortiori, the State may require that its employees not be subversive or disloyal persons. There is no constitutional right to be "engaged in one way or another in the attempt to overthrow the Government . . . by force or violence." In *Adler v. Board of Education of the City of New York*, 342 U.S. 485, the Court stated:

> "It is . . . clear that [persons] have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U.S. 75. They may work for the school system upon the *reasonable* terms laid down by the proper authorities of New York. . . . [They] . . . may be denied . . . the privilege of working for the school system of the State of New York because . . . of their advocacy of the overthrow of the government by force or violence . . ." (Emphasis added.)

That it is not merely *reasonable* but *imperative* that the government require that its employees not be disloyal or subversive persons is established by the President's Loyalty

Order of March 22, 1947, Executive Order No. 9835, 12 Federal Register 1935, which stated in part:

> ". . . it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States . . ."

and:

> ". . . maximum protection must be afforded to the United States against infiltration of disloyal persons into the ranks of its employees . . ."

It is clear that under the law it is neither unreasonable nor a violation of any constitutionally protected right for the State to require that its employees not be subversive or disloyal persons.

II.

A STATE, AS AN EMPLOYER, HAS A RIGHT TO REQUIRE AS A CONDITION OF EMPLOYMENT ACKNOWLEDGMENT OF LOYALTY TO IT BY THOSE WHO SEEK EMPLOYMENT.

It is also settled law that a State may take reasonable steps to assure itself that its employees or prospective employees are not subversive or disloyal persons, just as any employer may satisfy himself that his employees meet the reasonable requirements of the employment in question. The Supreme Court of the United States has specifically so held in *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716. Speaking of a Charter amendment providing for the oath and affidavit in question there, the Court stated at page 718:

> "The provisions operating thus prospectively were a *reasonable* regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States, cf. Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951). Likewise, as a regulation of political activity of municipal employees, the amendment was *reasonably* designed to protect the integrity and competence of the service. This Court has held that Congress may reasonably

> restrict the political activity of federal civil service employees for such a purpose, United Public Workers v. Mitchell, 330 U.S. 75, 102-103 (1947), and a State is not without power to do as much." (Emphasis added.)

The Court further stated at page 720:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service."

Justice Frankfurter in a concurring opinion stated at page 724:

> "The Constitution does not guarantee public employment. City, State, and Nation are not confined to making provisions appropriate for securing competent professional discharge of the functions pertaining to diverse governmental jobs. They may also assure themselves of fidelity to the very presuppositions of our scheme of government on the part of those who seek to serve it. No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor. See Gerende v. Board of Supervisors of Elections, 341 U.S. 56."

That a government may take reasonable steps to assure itself that its employees are not subversive or disloyal persons is further confirmed by the President's Loyalty Order, *supra*. Part V of that Order reads in relevant part:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the government of the United States."

Under Part V, there can be included in the determination of disloyalty:

"2c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States."

III.

THE MARYLAND OATH IS REASONABLE

Under the decisions of the Supreme Court of the United States quoted above, the appellant can prevail only if he can show:

(1) that the Maryland oath is constitutionally invalid for reasons e.g., vagueness, that could invalidate *any* oath, statute, or other governmental act; or

(2) that the Maryland oath is unreasonable (bearing in mind the repeated emphasis in the above-quoted cases on reasonability).

In reality, appellant is trying to argue that the Maryland oath is unreasonable. He does not use the word, however; words such as "reasonable" and "unreasonable" being sober, established, *legal* terms.

Rather, appellant attempts to establish the unreasonability of the statute and oath in question by means of non-legal pejorative terms and words of high emotional content.

Appellant's brief, for example, makes such statements as the following:

"Maryland's loyalty oath . . . certainly excludes loyal and fit persons who are highly conscientious and sensitive . . ." (page 54).

"Such oaths and inquiries are relics of the Salem Witch Trials . . . and earlier abominations" (page 58).

"For eighteen years this act has been an affront to loyal, conscientious people seeking public employment in the State of Maryland" (page 62).

But when examined in the light of the established law as to the rights of the State as employer, these arguments

can be seen to be without any substance whatever. Take, for example, the use of the word "abominations." Appellant does not contend that it is an "abomination" that the State should wish to keep subversive and disloyal persons out of its employ. He does not contend that oaths *per se* are "abomination." Yet putting the two together, he says that it is an "abomination" for the State to try to protect itself by means of an oath.

Or take his contention that the oath is an "affront." It is not claimed that it is an "affront" that the State wants to exclude disloyal persons from its employ. Appellant does not say that an oath, any oath, is an "affront." Yet somehow he concludes that the two put together are an "affront."

It is a strange kind of reasoning that conjoins a constitutional means with a constitutional end and comes up with an unconstitutional means-to-an-end.

Appellant's arguments, furthermore, consist essentially of broad assertions of fact based on astonishingly negligible evidence. He says, "For eighteen years this act has been an affront to loyal, conscientious people seeking public employment in the State of Maryland." Yet he points to only *two* persons (in eighteen years) who have been affronted, himself and a certain "distinguished Johns Hopkins University Scientist [sic]" referred to in connection with the Salem Witch Trials on page 57 of his brief!

According to appellant's reasoning, the hundreds of persons who during those eighteen years have taken the oath willingly and gladly, since they were not affronted, could not have been "loyal, conscientious people!" Only appellant and his "distinguished Johns Hopkins University Scientist" fit that description!

These are frivolous conclusions, to be sure. But such extraordinarily frivolous conclusions can follow only from

premises of like extraordinary frivolity, such as the appellant's in the present case.

CONCLUSION

This court, for the reasons stated above, should affirm the lower Court's action dismissing appellant's Complaint.

It is interesting to note by way of concluding statement that support can be found for the proposition that the Declaration of American Independence was the first American "loyalty oath". This view is neatly stated in the book "The Americans" by Daniel J. Boorstin published in 1965. Dr. Boorstin is professor of American History at the University of Chicago. On pages 378-382 of the above mentioned book he relates the story of the signing of the Declaration of Independence and cites Thomas McKeon, member of the Continental Congress from Pennsylvania, as his authority for holding that, "'the purpose of the Declaration as finally signed was to provide a kind of public loyalty-oath, a pledge of allegiance to the course already taken." Referring to McKeon's account of the signing, Dr. Boorstin says (page 379 of his book) "if this was the case, the Declaration was as much a loyalty-oath as a declaration of principles. And it was, then, one of the first and surely the best known and best reputed (as well as the most misunderstood) of the long line of Americans' efforts to reassure themselves by public oaths of loyalty."

Respectfully submitted,

EDWARD C. MACKIE,

Sixth Floor Title Building,
Baltimore, Maryland 21202,

Attorney for Amicus Curiae.*

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* Counsel is indebted to Robert W. Fox, Esquire, of Biglerville, Pennsylvania for his assistance in preparing this Brief.

SUPREME COURT OF THE UNITED STATES

No. 25.—October Term, 1967.

Howard Joseph Whitehill, Appellant, *v.* Wilson Elkins, President, University of Maryland, et al.	On Appeal From the United States District Court for the District of Maryland.

[November 6, 1967.]

Mr. Justice Douglas delivered the opinion of the Court.

This suit for declaratory relief that a Maryland teacher's oath required of appellant was unconstitutional was heard by a three-judge court and dismissed. 258 F. Supp. 589. We noted probable jurisdiction. 386 U. S. 906.

Appellant, who was offered a teaching position with the University of Maryland, refused to take the following oath:

> "I, _____, do hereby (Print Name—including middle initial) certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

The question is whether the oath is to be read in isolation or in connection with the Ober Act (Art. 85A, Md. Ann. Code, 1957) which by §§ 1 and 13 defines a "subversive" as ". . . any person who commits, attempts to

commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or *alter,* or to assist in the overthrow, destruction or *alteration* of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, *by revolution, force, or violence;* or who is a *member of a subversive organization* or a foreign subversive organization, as more fully defined in this article." (Italics supplied.) Section 1 defines the latter terms: "subversive organization" meaning a group that would, *inter alia,* "alter" the form of government "by revolution, force, or violence"; "foreign subversive organization" is such a group directed, dominated, or controlled by a foreign government which engages in such activities.

The oath was prepared by the Attorney General and approved by the Board of Regents that has exclusive management of the university. It is conceded that the Board had authority to provide an oath, as § 11 of the Act directs every agency of the State which appoints, employs, or supervises officials or employees to establish procedures designed to ascertain before a person is appointed or employed that he or she "is not a subversive person." And that term is, as noted, defined by §§ 1 and 13. Our conclusion is that, since the authority to prescribe oaths is provided by § 11 of the Act and since it is in turn tied to §§ 1 and 13, we must consider the oath with reference to §§ 1 and 13, not in isolation. Nor can we assume that the Board of Regents meant to encompass less than the Ober Act, as construed, sought to cover.

If the Federal Constitution is our guide, a person who might wish to "alter" our form of government may not

be cast into the outer darkness. For the Constitution prescribes the method of "alteration" by the amending process in Article V; and while the procedure for amending it is restricted, there is no restraint on the kind of amendment that may be offered. Moreover, the First Amendment, which protects a controversial as well as a conventional dialogue (*Terminiello* v. *Chicago*, 337 U. S. 1), is as applicable to the States as it is to the Federal Government; and it extends to petitions for redress of grievances (*Edwards* v. *South Carolina*, 372 U. S. 229, 235) as well as to advocacy and debate. So if §§ 1 and 13 of the Ober Act are the frame of reference in which the challenged oath is to be adjudged, we have important questions to resolve.

We are asked to treat §§ 1 and 13 as if they barred only those who seek to overthrow or destroy the Government by force or violence. Reference is made to *Gerende* v. *Election Board*, 341 U. S. 56, where, in considering the definition of "subversive" person applicable to § 15 of the Act, governing candidates for office, we accepted the representation of the Attorney General that he would advise the proper authorities in Maryland to take and adopt the narrower version of the term "subversive." The Court of Appeals of Maryland had indicated in *Shub* v. *Simpson*, 196 Md. 177, that the purpose of the Act was to reach that group, and that the words "revolution, force, or violence" in § 1 did not include a peaceful revolution but one accomplished by force or violence. *Id.*, pp. 190–191. In that view the "alteration" defined would be an alteration by force and violence. That construction had not yet been fashioned into an oath or certificate when *Gerende* reached us. That case involved an attempt by a candidate for public office in Maryland to require the election officials to dispense with an oath that incorporated the statutory language. The Court of Ap-

peals refused the relief asked. We referred to the narrow construction of §§ 1 and 15 given in the *Shub* case saying:

> "We read this decision to hold that to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt. — Md. at —, 76 A. 2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is affirmed." 346 U. S., at 56–57.

As we said in *Baggett* v. *Bullitt*, 377 U. S. 360, 368, n. 7, we did not pass upon or approve the statutory definition of a "subversive" person in the *Gerende* case. Rather we accepted the narrowing construction tendered by the Attorney General during oral argument so as to avoid the constitutional issue that was argued.

It is, however, urged that § 18 of the Act which contains a severability clause makes it possible for the Maryland Attorney General and for us to separate the wheat from the chaff that may be in §§ 1 and 13. The District Court found merit in the point. 258 F. Supp., at 596. But our difficulty goes deeper. As we have said in like situations, the oath required must not be so vague and broad as to make men of common intelligence speculate at their peril on its meaning. *Baggett* v. *Bullitt*, *supra*; *Elfbrandt* v. *Russell*, 384 U. S. 11; *Keyishian* v. *Board of Regents*, 385 U. S. 589. And so we are faced with the kind of problem which we thought we had avoided in *Gerende*.

As we have seen, §§ 1 and 13 reach (1) those who would "alter" the form of government "by revolution, force, or violence" and (2) those who are members of a subversive organization or a foreign subversive organization.

The prescribed oath requires, under threat of perjury, a statement that the employee is not engaged "in one way or another" in an attempt to overthrow the Government by force or violence. Though we assume *arguendo* that the Attorney General and the Board of Regents were authorized so to construe the Act as to prescribe a narrow oath (1) that excluded "alteration" of the Government by peaceful "revolution" and (2) that excluded all specific reference to membership in subversive groups, we still are beset with difficulties. Would a member of a group that was out to overthrow the Government by force or violence be engaged in that attempt "in one way or another" within the meaning of the oath, even though he was ignorant of the real aims of the group and wholly innocent of any illicit purpose? We do not know; nor could a prospective employee know, save as he risked a prosecution for perjury.

We are in the First Amendment field. The continuing surveillance[1] which this type of law places on teachers is hostile to academic freedom. As we said in *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait-jacket upon the intellectual leaders in our colleges and universities

[1] There is not only the provision for perjury prescribed in § 11, but § 14 which provides in part that "Reasonable grounds on all the evidence to believe that any person is a subversive person, as defined in this article, shall be cause for discharge" of the employee.

> would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

The restraints on conscientious teachers are obvious. As we noted in the *Elfbrandt* case, even attendance at an international conference might be a trap for the innocent if that conference were predominantly composed of those who would overthrow the Government by force or violence. 384 U. S., at 16–17. "Juries might convict though the teacher did not subscribe to the wrongful aims of the organization." *Id.*, at 17.

In sum, we read the oath as an integral part of the Ober Act; and we undertake to read §§ 1 and 13 of that Act in light of the gloss that the Maryland courts have placed on it. We know that the *Shub* case says that "a person who *advocates* the overthrow of the Government of the United States . . . through force or violence could scarcely in good faith, take the constitutional oath of office . . . ." 196 Md., at 190. (Italics supplied.) Yet that case does little more than afford the basis for argument that membership in a subversive organization means that the member must advocate a violent overthrow. This, however, is speculation, not certainty. Another Maryland case bearing on the question is *Character Committee* v. *Mandras*, 233 Md. 285. There an applicant for admission to the Maryland bar answered "No" to the question "Are you now or have you ever been a subversive person as defined by the [Ober Act]?" He had apparently at one time been a member of the Communist Party. At a hearing he testified he had joined

the party because he was interested in the candidacy of Henry Wallace and in the cause of civil liberties; but he denied he had been a subversive person or that he had advocated violent overthrow of the Government. The Court of Appeals affirmed the Board of Law Examiners, finding that the applicant was not a subversive person. So it can be argued that passive membership as a matter of Maryland law does not make a person a subversive. Yet, as we read §§ 1 and 13 of the Ober Act, the alteration clause and membership clause are still befogged.[2] The lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find an overbreadth that makes possible oppressive or capricious application as regimes change. That very threat, as we said in another context (*N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432–433) may deter the flowering of academic freedom as much as successive suits for perjury.

Like the other oath cases mentioned, we have another classic example of the need for "narrowly drawn" legislation (*Cantwell* v. *Connecticut*, 310 U. S. 296, 311) in this sensitive and important First Amendment area.

Reversed.

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[2] Art. 15, § 11, of the Maryland Constitution reads:

"No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any office, be it elective or appointive, or any other position of profit or trust in the Government of or in the administration of the business of this State or of any county, municipality or other political subdivision of this State."

Shub tells us that the Ober Act was enacted pursuant to this state constitutional provision. 196 Md., at 192. Our attention is not drawn to, nor have we found, any severability clause applicable to this constitutional provision. It is certainly dubious, then, whether the severability clause of the Ober Act can operate to "sever" the membership clause in the definition of subversive person so that it reads more narrowly than the constitutional provision upon which the Ober Act rests.

SUPREME COURT OF THE UNITED STATES

No. 25.—October Term, 1967.

Howard Joseph Whitehill, Appellant, *v.* Wilson Elkins, Presicent, University of Maryland, et al.	On Appeal From the United States District Court for the District of Maryland.

[November 6, 1967.]

Mr. Justice Harlan, whom Mr. Justice Stewart and Mr. Justice White join, dissenting.

Maryland will doubtless be surprised to learn that its meticulous efforts to conform the state "loyalty oath" to the requirements of *Gerende* v. *Election Board*, 341 U. S. 56, have been to no avail. It will also be entitled to feel baffled by an opinion which, while recognizing the continuing authority of *Gerende*, undertakes to bypass that decision by a process of reasoning that defies analysis.

Petitioner Whitehill was denied employment in the state university as a temporary lecturer by reason of his refusal to sign an oath that more than meets the requirements of *Gerende*. He was asked only whether he is *now*, in one way or another *engaged in* an attempt to overthrow the Government *by force and violence*.[1] References to international conferences, controversial discussions, support of minority candidates, academic freedom and the like cannot disguise the fact that Whitehill was asked simply to disclaim actual, present activity, amounting in effect to treasonable conduct. Allusions

[1] The oath did not even include the limited sort of "membership" clause also approved in *Gerende*. See the Court's opinion, *ante*, pp. 1, 3–4.

to the constitutional amending process cannot obscure the fact that this oath makes no reference to "alteration" of our form of government or to "believing in" or "being a member of" anything whatsoever. The oath itself, then, in no way violates, jeopardizes, or beclouds petitioner's freedom of speech or of association. So much, indeed, the Court's opinion appears to concede.

The Court concludes, however, that the oath must be read "in connection with" certain sections of the Ober Law because, as a state matter, the authority of the Board of Regents to require an oath derives from that law. The Court does not pause to tell us what the "connection" is or to explain how it serves to invalidate the unambiguous oath required of this petitioner. On the one hand, it is plain, as the Court artistically avoids conceding, that the only effect of the law on this petitioner is to deny him state employment if he refuses to sign an oath which, in itself, he can have no constitutional objection to signing. On the other hand, nowhere does the Court suggest that the character of the oath itself is altered by any language in the statute authorizing the Regents to impose it. The oath does not refer to the statute[2] or otherwise incorporate it by reference. It contains no terms that are further defined in the statute. In short, the oath must be judged on its own bottom.

The only thing that does shine through the opinion of the majority is that its members do not like loyalty oaths. Believing that it is not within the province of this Court to pass upon the wisdom or unwisdom of Maryland's policy in this regard, and finding nothing *unconstitutional* about the oath tendered to this petitioner, I would affirm the judgment of the court below.

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[2] The document submitted to petitioner for his signature did contain the notation customary to government documents of the authority under which it was promulgated.